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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
THE CHOCTAW NATION AND THE CHICKASAW NATION. } No. 337.

THE CHOCTAW NATION AND THE CHICKASAW NATION, appellants,
v.
THE UNITED STATES AND THE WICHITA and affiliated bands of Indians. } No. 339.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case arises under the act of March 3, 1895, § 1 (28 Stats., 876, 894–899), referring to the Court of Claims the claim of the Choctaws and Chickasaws to a

certain tract of land known as the Wichita Reservation, and also the claim of the Wichita and affiliated bands of Indians to compensation in the event of the sale, by the United States, of the balance of the land in the said reservation, over and above a certain area to be allotted to the Indians of the Wichita and affiliated bands in severalty. This Wichita Reservation is a portion of a larger district, commonly known as the Leased District, which was first leased and afterwards ceded to the United States by certain treaty provisions.

The lease, made in 1855, was as follows:

> The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however,* the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore. (Treaty of June 22, 1855, art. 9; 11 Stats., 613.)

This lease was coupled with a relinquishment, by the Choctaws alone, of all their right, title, and interest in

any and all lands west of the one-hundredth meridian, and the consideration named for the relinquishment and the lease was $800,000, of which $600,000 were paid to the Choctaws and the balance to the Chickasaws.

The cession, made in 1866, was as follows:

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district. (Treaty of April 28, 1866, Art. III; 14 Stats., 769.)

This cession was coupled with certain provisions for the disposition of the consideration, which provisions have been fully complied with as regards the Choctaws, but there has as yet been no final disposition of the Chickasaws' share, owing to their not having yet made provision for their freedmen in accordance with this article of the treaty.

The court below has held that this cession, though absolute on its face, was really in trust for the permanent settlement of friendly tribes of Indians on the land ceded, and that the Choctaws and Chickasaws have a reversionary interest in so much of the land as is not actually used for Indian settlement or allotted to Indians in severalty. The existence of this trust is held to result from various facts and circumstances leading up to the cession of 1866, and also to be shown by subsequent facts and circumstances. These facts and circumstances are the following:

By the treaty of August 24, 1818 (7 Stats., 176), the Quapaw tribe of Indians ceded to the United States a

certain tract of country in the Arkansas Territory, the western bounds of the cession being thus described:

> Beginning at the mouth of the Arkansaw river; thence, extending up the Arkansaw, to the Canadian fork, and up the Canadian fork to its source; thence south, to Big Red river, and down the middle of that river, to the Big Raft.

When this treaty was made the real source of the Canadian fork of the Arkansas, or, as it is now called, the Canadian River, was universally believed to be the source of the Red River (called in the treaty, "Big Red river"), and the Canadian was itself universally supposed to be a comparatively short stream rising at or slightly east of the one hundredth meridian. (U. S. Exhibits, Nos. 1, 2, 3, 5, 6, 11, 12, *infra*.)

On the face of the treaty itself is a map of the Quapaw cession (U. S. Exhibit No. 10, *infra*), without indications of latitude or longitude, but drawn to the same scale as, and manifestly based on, Plate I of Pike's "Chart of the Internal Parts of Louisiana" (U. S. Exhibit No. 2), which latter shows the Canadian as rising at the one hundredth meridian. Melish's map of 1818 (U. S. Exhibit No. 6) puts the source of the Canadian just east of the one hundredth meridian. The opinion of the court below (Rec., 392) states that certain maps "did in fact delineate the stream subsequently known as the Canadian, with its source west of the one hundredth meridian." This statement, which, it is submitted, is erroneous, will be discussed in the argument. From the source of the Canadian, as shown by the maps of 1818, a line could be drawn south to the Red River, and the

treaty map itself shows such a line drawn due south; but the true source of the Canadian being considerably west of that of the Red River, no line could actually be drawn south from the former to the Red River, and in point of fact a line drawn from the source of the Canadian to the nearest point of the Red River (i. e., to the latter's source) would cross the Canadian itself several times, so that, even if the word "south" be not regarded as essential, the description "up the Canadian fork to its source, thence south to Big Red river," is an impossible description if used with reference to the actual geography. If the western boundary of the land between the Canadian and Red rivers were on a line drawn from the source of the former to the nearest point of the latter, the land itself could not run to the source of the Canadian, and its western boundary would have to be the lower portion only of such a line, the portion beginning where such a line last crosses the Canadian.

The French treaty of 1803, ceding Louisiana, did not define its western boundary, but on February 22, 1819, a treaty with Spain (8 Stats., 252) was signed, establishing the boundary between the United States and the Spanish dominions in that region, in these words:

> The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, on the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or *Red River;* then following the course of the Rio Roxo westward to the degree of longitude 100 west

> from London and 23 from Washington; then crossing the said Red River and running thence, by a line due north, to the river Arkansas.

This treaty was ratified by the President on February 24, 1819, but was not ratified by the King of Spain within the period of six months fixed for the exchange of ratifications. The Spanish minister having asked for an extension of the time, the President's message of May 9, 1820 (Messages, Vol. II, p. 72), suggested to Congress the propriety of postponing any decision adverse to the treaty, while the message of November 14, 1820 (id. 75), stated that the Spanish ratification was daily expected. The treaty had actually been ratified on October 24, but the Spanish minister did not receive the ratification until early in 1821. The exchange of ratifications was authorized anew by the Senate February 19, 1821, and took place shortly thereafter. (Am. State Papers, For. Relns., Vol. IV, pp. 650–703.)

On July 12, 1820, Generals Jackson and Hinds were commissioned to treat with the Choctaws for a part of their lands in Mississippi, and were instructed to offer the Indians in exchange "a portion of the Quapaw cession in the Arkansas Territory" (Am. State Papers, Ind. Affs., Vol. II, p. 231), and on October 18, 1820, a treaty was executed (7 Stats., 211) ceding to the Choctaws the western part of the Quapaw cession, the western bounds being described as follows:

> Up the Arkansas to the Canadian Fork, and up the same to its source; thence due South to the Red River; thence down Red River, three miles below the mouth of Little River.

This treaty was received in Washington in December, 1820 (Rec., 268), sent to the Senate, along with other Indian treaties, on December 14, and ratified without amendment on December 21. (3 Sen. Ex. Jour., 227, 229, 230.)

At the time this treaty was made and ratified, the general belief as to the position of the source of the Canadian was the same as in 1818, but on September 13, 1820, Maj. S. H. Long, who, on his return from a long tour of exploration, had followed down the Canadian from its source (believing it to be the Red River), reached its junction with the Arkansas and discovered that the maps were at fault. (Rec., 266.) His brief report stating the fact (the last of a series of reports transmitted during his journeys) reached the War Department in November, 1820 (Rec., 266), and he himself reached Washington the latter part of the same month, when he was ordered to Philadelphia to prepare a complete report of the country traversed by his expedition (Rec., 267), which report he ultimately completed in February, 1821 (Rec., 272). There is no evidence that the treaty commissioners, the Secretary of War, the President, or any members of the Senate, had actual knowledge of Long's discovery before his complete report was written.

The Choctaw treaty of September 26, 1830 (7 Stats., 333), contained the following provisions:

> ARTICLE I. * * * and that this may be considered the Treaty existing between the parties, all other Treaties heretofore existing and inconsistent with the provisions of this are hereby declared null and void.

ARTICLE II. The United States under a grant specially made by the President of the U. S., shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, * * * beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. * * *

ARTICLE III. In consideration of the provisions contained in the several articles of this treaty, the Choctaw Nation of Indians consent and hereby cede to the United States the entire country they own and possess east of the Mississippi River. * * *

[The succeeding articles contain various provisions for the benefit of the Choctaws.]

Under an agreement made January 17, 1837 (7 Stats., 605), the Chickasaws settled on a part of the Choctaw country, but afterwards various controversies arose between the two tribes, and in 1854 their delegates came to Washington to settle all matters in dispute by means of a treaty with the United States. During the negotiations the Choctaw delegates asserted that their country extended westward to the actual source of the Canadian. (Senate Misc. Doc. No. 31, Thirty-fourth Congress, first session, 42.) This claim was never recognized by the United States, but as the latter wished to purchase the right to settle other Indians on a part of the Choctaw and Chickasaw lands, and also to put an end to the Choctaw claim to land west of the one hundredth meridian, the treaty of June 22, 1855 (11 Stats., 611), besides de-

fining the Choctaw and Chickasaw districts, provided as follows:

ART. 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however*, the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

ART. 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct.

The population of the Choctaws at that time was a little more than three times that of the Chickasaws.

(House Ex. Doc. No. 1, Thirty-fourth Congress, first session, 575.)

In 1859 the United States settled the Wichita and affiliated bands of Indians in the leased district, upon a portion of the land now in dispute. (Sec. of Inter. Rept., 1859, pp. 382–383, 533, 633).

Both the Choctaws and Chickasaws were slaveholding tribes, and in sympathy with the secession movement. On February 7, 1861, the general council of the Choctaws declared that they would go with the Southern States, and on May 25, 1861, the Chickasaw legislature did the same. (Reb. Rec., Vol. I, 682; Vol. III, 585-587.) On July 12, 1861, the two tribes entered into a treaty of alliance, offensive and defensive, with the Confederate States, and thereafter engaged in active hostilities against the United States. (Reb. Rec., Vol. VIII, pp. 1–33, 194–5, 206–8, 235–6, 534, 697–8, 709, 712–13, 715, 719–21; Vol. XIII, pp. 297–304, 333–6, 820, 831, 859, 892–6, 944–948, 952, 955–6; Vol. XXII, pt. 1, pp. 28–36, 457–462; pt. 2, p. 1118; Vol. XXXIV, pt. 1, pp. 107–112, 849, 888, 1011–13; pt. 2, pp. 875, 882, 959, 994, 1084; pt. 3, pp. 746, 824; pt. 4, pp. 694–5; Vol. XLI, pt. 1, pp. 31–6; pt. 3, pp. 982–4; pt. 4, pp. 1086–96; Vol. XLVIII, pt. 1, p. 456; pt. 2, pp. 911, 1302–4, 1311, 1315.)

A council of the Indian tribes of the Southwest was convened to meet at Fort Smith, Ark., September 8, 1865, to renew allegiance with the United States. The commissioners of the United States informed the assembled delegates of the tribes that they had broken their former treaties, and that new treaties between them and the

United States would have to be entered into, to contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.

5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States for organizing the Indian Territory.

7. No white person, except officers, agents, and employees of the Government, or of any internal improvement authorized by the Government, will

be permitted to reside in the Territory, unless formally incorporated with some tribe, according to the usages of the band.

(Report of Secretary of the Interior, 1865, pp. 480–483, 496–503.)

In pursuance of this plan, the commissioners proposed a treaty with the Choctaws and Chickasaws, covering all the seven stipulations and containing also the following article:

> ARTICLE 5. The Choctaw and Chickasaw tribes agree to a modification of the ninth article of the treaty concluded at the city of Washington the 22d day of June, A. D. 1855, by which they agree that all that portion of their common territory west of the ninety-eighth degree west longitude, leased to the United States, may be used for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate thereon, without exception or restriction as to the character of the tribes. (Rec., 453.)

The Choctaw and Chickasaw delegates agreed to the proposed treaty, but it was never approved by their councils or executed. (Sec. of Int. Rept. 1865, p. 204.) Other delegates were chosen with power to make such a treaty, however, and came to Washington in 1866, employing J. H. B. Latrobe, esq., as their counsel. (Rec., 189.) A treaty was made April 28, 1866 (14 Stat., 769), more elaborated and detailed than that proposed the year before, and providing, *inter alia*, as follows:

Article I provided for peace and friendship, as required by the first two of the stipulations presented at the Fort Smith council.

Article II abolished slavery, as required by the third and fourth stipulations.

Article III was as follows:

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent., in trust for the said nations until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days before the passage of such laws, rules, and regulations,

shall elect to move, and actually remove, from t
said nations respectively. And should the s
laws, rules, and regulations not be made by t
legislatures of said nations, respectively, within t
years from the ratification of this treaty, then t
said sum of three hundred thousand dollars sha
cease to be held in trust for the said Choctaw a
Chickasaw nations, and be held for the use a
benefit of such persons of African descent as th
United States shall remove from the said territo
in such manner as the United States shall dee
proper, the United States agreeing, within ninet
days from the expiration of said two years, to r
move from said nations all such persons of Africa
descent as may be willing to remove; those remain
ing or returning after having been removed fro
said nations to have no benefit of said sum of thre
hundred thousand dollars, or any part thereof, bu
shall be upon the same footing as other citizens o
the United States in the said nations.

Article IV contained further provisions for the civi
rights of the negroes, as required by the third stipula-
tion, and a temporary provision for the cultivation o
land by them, until some permanent provision was made
for them or they removed elsewhere.

Article VIII provided for a consolidated government
for all the tribes in the Indian Territory, as required by
the sixth stipulation.

Article X reaffirmed the obligation of treaties in force
before the rebellion and "not inconsistent herewith."

Articles XXX, XXXI, and XXXVII were as
follows:

ARTICLE XXX. The Choctaw and Chickasaw
nations will receive into their respective districts east

of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, * * * and among others the right to select land as herein provided for Choctaws and Chickasaws [i. e., one quarter section for each person, male or female, adult or minor, in severalty, see Articles XV, XXXIII].

ARTICLE XXXI. And whereas some time must necessarily elapse before the surveys, maps, and selections herein provided for can be completed so as to permit the said Kansas Indians to make their selections in their order, during which time the United States may desire to remove the said Indians from their present abiding places, it is hereby agreed that the said Indians may at once come into the said Choctaw and Chickasaw nations, settling themselves temporarily as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

ARTICLE XXXVII. In consideration of the right of selection heretofore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw nations, out of the funds of Indians removing into said nations, respectively, under the provisions of this treaty, such sum as may be fixed by the legislatures of said nations, not exceeding one dollar per acre, to be divided between the said nations in the proportion of one-fourth to the Chickasaw Nation and three-fourths to the Choctaw Nation. * * *

Article XLIII provided for the exclusion of white men, as required by the seventh stipulation.

Article XLV provided that the former rights and immunities of the Indians should remain in force, "so far as they are consistent with the provisions of this treaty."

Article XLVI provided that $150,000 should be advanced and paid to the Choctaws, and $50,000 to the Chickasaws, of the moneys stipulated to be paid for the cession of the leased district (under Article III) and the admission of the Kansas Indians among them (under Article XXXVII), these sums to be repaid out of the said moneys when due, or other moneys of these Indians in the hands of the United States.

On May 21, 1883, the Choctaws enacted the requisite law in regard to their freedmen. (Choc. Laws, 1894, p. 335.) The Chickasaws did the same on January 10, 1873 (H. Ex. Doc. No. 207, Forty-second Congress, third session), but this act was not approved by Congress until August 15, 1894 (28 Stats., 336), and in the meantime the Chickasaws had passed other laws inconsistent with their law of 1873, which they never attempted to carry into effect. (Sen. Mis. Doc. No. 24, Fifty-third Congress, third session, pp. 11, 29.)

The $300,000, the consideration for the cession of the leased district in 1866, have been disposed of as follows:

Payments to the Choctaw Nation.

Appropriation of July 26, 1866 (14 Stats., 259), under 46th article of the treaty	$150,000.00
Appropriation of July 26, 1866, for interest (14 Stats., 259), under same article	11,250.00

Appropriation of April 10, 1869, for interest (16 Stats., 39), under same article		$11,250.00
Appropriation of May 17, 1882, for education of freedmen (22 Stats., 72)		7,500.00
Appropriation of March 3, 1885 (23 Stats., 366), to be placed to the credit of the Choctaws on the books of the Treasury, computed as follows:		
Balance of principal due Choctaws	$67,500	
Deduct overpayment of interest, 1867, amounting to	$7,500	
Deduct for same in 1868	7,875	
	15,375	
		52,125.00
		232,125.00

Payments to the Chickasaw Nation.

Appropriation of July 26, 1866 (14 Stats., 259), under 46th article of the treaty	50,000.00
Appropriation of July 26, 1866, for interest (14 Stats., 259), under same article	3,750.00
Appropriation of April 10, 1869, for interest (16 Stats., 39), under same article	3,750.00
Appropriation of May 17, 1882, for education of freedmen (22 Stats., 72)	2,500.00
	60,000.00

(Rec., 264.)

Under the treaty of October 21, 1867 (15 Stats., 581), the Kiowa and Comanche tribes were settled on a reservation in the so-called "leased district," and by the Executive order of August 10, 1869, the Cheyennes and Arapahoes were settled on another reservation within that district. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, pp. 2–3.) In 1872 certain chiefs and delegates of the Wichita and affiliated bands entered into

the following agreement with the Commissioner of Indian Affairs:

> Articles of agreement made and concluded at Washington City, District of Columbia, this nineteenth day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, head men, and members of the Wichitas and affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:
>
> ARTICLE 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ W. L., thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the 98th meridian, thence due south to the place of beginning.
>
> ARTICLE 2. In consideration of the reservation provided for in the preceding article the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest, or claim of any nature whatsoever in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States.

In his annual report for 1872 the Commissioner of Indian Affairs (p. 101) recommended the ratification of this agreement, but no action was taken by Congress upon this recommendation. Since the date of the agree-

ment, however, the boundaries therein named have been officially maintained as those of the Wichita Reservation, and annual appropriations have been made for the support of the Wichita and affiliated bands, on their reservation. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, pp. 3, 56.)

These three reservations occupied the whole of the so-called "leased district," except the southwestern portion, known as Greer County, upon which no Indians have been settled, the title thereto having been claimed by the State of Texas until the decision of this court in *United States* v. *Texas* (162 U. S., 1) in March, 1896.

In 1890 the United States agreed with the Cheyennes and Arapahoes to give to each member of those tribes, in severalty, 160 acres of the land contained in their reservation, and to pay these tribes $1,500,000 for the cession to the United States of the balance of the reservation. This agreement was approved by Congress March 3, 1891, and at the same time $2,991,450 were appropriated, to be paid to the Choctaws and Chickasaws for their interest in the Cheyenne and Arapahoe reservation. (26 Stats., 1022–1025.)

On February 18, 1892, the President sent a message to Congress stating that he did not believe that the Choctaws and Chickasaws were entitled to be paid for the Cheyenne and Arapahoe Reservation; that at all events a considerable proportion of the $800,000 paid them for the lease in 1855 should have been deducted, and that in any payments to the Choctaws they should be protected against extortion on the part of their agents, who had arranged to receive from them 25 per cent of the amount

appropriated for the tribe. (Sen. Ex. Doc. No. 42, Fifty-second Congress, first session.) Congress ultimately resolved "that there is no sufficient reason for interference in the due execution of the law referred to." (23 Cong. Rec., 4093; 24 id., 178.)

An error of $48,800 having been discovered in the computation of the amount appropriated to pay the Choctaws and Chickasaws for their interest in the Cheyenne and Arapahoe Reservation, Congress directed the retention of the erroneous excess, with this proviso:

> *Provided, however,* That neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe Reservation, dated March third, eighteen hundred and ninety-one, nor of this resolution, shall be held in any way to commit the Government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situated in what is commonly known and called the "leased district." (Joint Res. of Jan. 18, 1893, 27 Stats., 753.)

On June 4, 1891, an agreement was made between the United States and the Wichita and affiliated bands of Indians for the allotment to each of the said Indians, in severalty, of 160 acres of a certain tract of land therein described (heretofore known as the Wichita Reservation), and for the sale of the balance thereof subject to the decision of Congress upon the claim of the said Indians for compensation for the said balance. This agreement was submitted to Congress January 6, 1892. (Sen. Ex. Doc. No. 14, Fifty-second Congress, first session.) By the Indian appropriation act of March 2, 1895, § 1 (28

Stats., 876, 894–899), the claim of the Choctaws and Chickasaws to this land, and that of the Wichita and affiliated bands to compensation for the unallotted portion, were referred to the court below for final adjudication, the United States being made a party defendant to the suit.

The case was tried in January, 1898, and on March 21, 1899, the court below entered its decree (Peele, J., dissenting), providing that the proceeds of the sale of the balance of the Wichita Reservation, over and above the allotments made or to be made to the members of the Wichita and affiliated bands, should be paid to the Choctaws and Chickasaws (Rec., 442); whereupon the United States took an appeal, and the Choctaws and Chickasaws took a cross appeal. (Rec., 443.) The Wichita and affiliated bands also appealed (Rec., 443), but as their appeal, in so far as it is against the United States, raises entirely different issues, it will be considered in a separate brief.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In holding that it had jurisdiction, under the act of March 3, 1895, to go behind the plain and unambiguous words of cession in Article III of the treaty of April 28, 1866, and to inquire whether the cession, absolute on its face, was intended to establish a trust as to the lands ceded in favor of the parties ceding them.

2. In holding that the country ceded by the Quapaws to the United States by the treaty of August 24, 1818, extended west of the one hundredth meridian.

3. In holding that the country ceded by the United States to the Choctaws by the treaty of October 18, 1820, extended west of the one hundredth meridian.

4. In holding that the treaty of September 27, 1830, between the United States and the Choctaws, did not annul any cession of lands west of the one hundredth meridian, supposing such cession to have been made by the treaty of October 18, 1820.

5. In holding that the United States, by the treaty of June 22, 1855, recognized that the Choctaws had any real right, title, or interest in lands west of the one hundredth meridian, and that the sum of $800,000, paid by the United States to the Choctaws and Chickasaws under that treaty, was not paid exclusively for the lease of the country between the ninety-eighth and one hundredth meridians.

6. In holding that the fifth stipulation, announced by the commissioners at the Fort Smith council in 1865, was not embodied in Articles XXX, XXXI, and XXXVII of the treaty of April 28, 1866, with the Choctaws and Chickasaws.

7. In holding that the cession of the territory west of the ninety-eighth meridian, known as the leased district, by the Choctaws and Chickasaws, made by the said treaty of April 28, 1866, was not absolute.

8. In holding that the cession of the said territory, made by the said treaty, was made upon a trust of such a character that the sale of the unallotted portion of the Wichita Reservation would constitute a breach of the trust, even though such sale should be made for the

benefit of the Wichita and affiliated bands of Indians located upon the said reservation.

9. In entering a decree that the Choctaw Nation and the Chickasaw Nation are in law and equity entitled to and are the owners of the unallotted portion of the Wichita Reservation, and that in the event of the sale of such unallotted portion by the United States, they shall be entitled to, and shall receive from the United States, the proceeds of such sale.

BRIEF OF ARGUMENT.

This suit concerns a particular tract of 743,610 acres in the Indian Territory, known as the Wichita Reservation, and practically it also concerns the Kiowa, Comanche, and Apache reservations of 2,968,893 acres, and the district known as Greer County, containing 1,511,958 acres, the act of June 28, 1898, § 29 (30 Stats., 495, 513), having provided as follows:

> It is further agreed that the final decision of the courts of the United States in the case of the Choctaw Nation and the Chickasaw Nation against the United States and the Wichita and affiliated bands of Indians, now pending, when made shall be conclusive as the basis of the settlement as between the United States and said Choctaw and Chickasaw nations for the remaining lands in what is known as the "Leased District," namely, the land lying between the ninety-eighth and one hundredth degrees of west longitude and between the Red and Canadian rivers, leased to the United States by the treaty of eighteen hundred and fifty-five, except that portion called the Cheyenne and Arapahoe country, heretofore acquired by the United States.

The decree of the court below refers only to the Wichita Reservation (although under the above statute it must, if affirmed, be conclusive as to all the rest of the "Leased District"), and it provides that the Wichita and affiliated bands of Indians, numbering 1,060, are entitled to 160 acres of land apiece in that reservation, but that the proceeds of the balance (574,010 acres), when sold, shall be paid to the Choctaws and Chickasaws (Rec., 442). In so far as this decree declares the Wichita and affiliated bands entitled to certain allotments of lands, it sustains the agreement of June 4, 1891 (28 Stats., 895), between the United States Commissioners and those Indians, and is not appealed from by the United States; but in so far as it holds the Choctaws and Chickasaws entitled to the proceeds of the sales of the balance of the land, the United States appeals from the decree on three grounds, viz:

I. The cession of the "leased district" in 1866 being absolute on its face, the court below had no jurisdiction to go behind the plain words of cession and inquire into any supposed intention of the parties to the treaty of 1866 to create a trust in the land ceded.

II. The cession of the "leased district" in 1866 was, as a matter of fact, absolute and not in trust.

III. Supposing the cession of the "leased district" in 1866 to have been in trust, that trust was for the permanent settlement of friendly Indian tribes upon the land within the district, with the same right of perpetual occupancy that has always, as a matter of law, been conceded to Indian tribes in the lands occupied by them either by aboriginal title or under a grant from the United States, or from other Indians with the approval of the

United States. This right of perpetual occupancy, if not parted with by abandonment or a sale or exchange of the land, entitles the occupants, on the termination of the reservation system, to individual allotments of the land in severalty, and to the sale of the unallotted balance for their benefit.

These grounds of appeal will be considered in their order.

I.

THE COURT BELOW HAD NO JURISDICTION TO GO BEHIND THE PLAIN WORDS OF CESSION IN THE TREATY OF 1866, AND TO INQUIRE INTO ANY SUPPOSED INTENTION OF THE PARTIES TO CREATE A TRUST, INSTEAD OF MAKING AN ABSOLUTE CESSION. (See the first assignment of error.)

The right of the United States to dispose of the Wichita Reservation is derived from the following clause of the treaty of April 28, 1866 (14 Stats., 769):

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district.

The court below has undertaken to reform the treaty of 1866.

A majority of the court below has stated its understanding of the effect of this cession as follows:

> We hold the cession in the treaty of 1866 was not intended to divest the Choctaws and Chickasaws of all their interest in the leased district, but was

> intended to enlarge the scope of the ninth article of the treaty of 1855. Hence a trust must be implied in favor of the claimants under the terms of the grant. (Rec., 427.)

It is evident that this conclusion involves a reformation of the language of the treaty of 1866, making a trust out of what is on its face an absolute cession.

Practically the court below has made the first clause of Article III of the treaty of 1866 read as follows:

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, in trust for the permanent settlement of Indians thereon; and if any portion or portions of the said district be at any time sold by the United States, for any purpose whatever, then three-fourths of all the proceeds of such sale or sales shall be paid to the Choctaws and one-fourth to the Chickasaws.

It is submitted that such a reformation was beyond the jurisdiction of the court below.

That the court below has undertaken to reform the treaty is clear. The word "cede" does not import any trust or condition whatever, nor is it in any sense a word of doubtful meaning, nor one capable of being used in many different senses. The accepted definition is this:

> CEDE. To assign; to transfer. Applied to the act by which one State or nation transfers territory to another. (*Bouvier's Law Dict.*)

There is nothing whatever in the word, when used without other qualifying words, to import that the assignment or transfer can be less than absolute; and there is

nothing in the proviso which follows the words of cession to qualify them in any way. This proviso reads:

> Provided that the said sum shall be invested and held by the United States at an interest not less than five per cent, in trust for the said nations until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days before the passage of such laws, rules, and regulations, shall elect to move, and actually remove, from the said nations, respectively. And should the said laws, rules, and regulations not be made by the legislatures of said nations, respectively, within two years from the ratification of this treaty, then the

said sum of three hundred thousand dollars s
cease to be held in trust for the said Choctaw
Chickasaw nations, and be held for the use
benefit of such persons of African descent as
United States shall remove from the said terri
in such manner as the United States shall de
proper, the United States agreeing, within nin
days from the expiration of said two years, to
move from said nations all such persons of Afri
descent as may be willing to remove; those rema
ing or returning after having been removed fr
said nations to have no benefit of said sum of th
hundred thousand dollars, or any part thereof, b
shall be upon the same footing as other citizens
the United States in the said nations. (14 Stat
769).

This proviso does not relate to what the United Stat
is to do with the land acquired by this cession, b
exclusively to the disposition and uses of the purcha
money, as the court below admits. (Rec., 414.) Th
proviso does not control in any way the title of th
United States to the ceded territory by way of a cond
tion either precedent or subsequent, and, moreover, th
proviso has been complied with by the payment to th
Choctaws of their entire share of the fund (Rec., 264
while compliance as regards the Chickasaws has bee
merely delayed by their own undecided course of actio
toward their freedmen.

The language of the treaty not doubtful or inconsistent.

The view of the court below appears to be, however
that while the actual words of cession are clearly abso
lute, the rest of the treaty contains provisions inconsisten

with an absolute cession, so that taking the treaty as a whole the intention with regard to the character of the cession is not expressed with absolute certainty, but leaves room for construction and interpretation in the light of evidence outside the instrument itself, and, further, that the jurisdictional act must have contemplated a resort to such construction and interpretation. As to the treaty itself, the opinion says:

> That the cession under consideration was by treaty does not exclude those means of ascertaining the intention of the parties which have the effect of informing the court of every material fact supposed to govern them when the treaty was executed, if, as appears here, the ceding clause be followed by language embodying such terms and conditions as to raise reasonable doubt of what the parties really intended. * * * This is not a case * * * where both parties were entitled to have and receive by virtue of the act conferring jurisdiction only those things to which they were entitled under the stipulations of a treaty plain upon its face, concerning which there was but little or no controversy, but one where the instrument, *being ambiguously expressed*, left room for doubt as to the intention of the parties. * * * The use of evidence *aliunde* the instrument, showing, or tending to show, the avowed objects in view, does not necessarily imply that the language of the treaty is to be amended by the extrinsic matter, or that the treaty executed by the parties is to be displaced for one to be made by the court (which, of course, can not be done), but that *the doubtful instrument as it appears to have been written* is to be interpreted in the light of the occurrences which explain the intent and the reasons for the different understanding. (Rec., 408–410.)

After such assertions as these, one would naturally expect that the opinion would at once proceed to point out clearly those portions of the treaty which throw doubt upon the meaning of the words of cession, and make their apparently plain meaning ambiguous. This, however, the opinion does not do, but proceeds with the consideration, previously begun, of various matters outside the treaty, which are thought to throw light upon it; and it is only after these matters have been pretty fully considered that the language and provisions of the treaty are reviewed at all. In fact, taking the opinion of the court below as it stands, the suspicion arises that this evidence *aliunde* has been looked at first, and has so affected the mind of the learned judge as to make him afterwards see in the treaty the doubtful and ambiguous provisions which, he says, authorize a recourse to evidence *aliunde*.

Coming at last to the treaty itself, the learned judge says:

> Following the cession is a proviso relating to the disposition and uses of the fund. Then come numerous articles covering many subjects with much circumstantiality of detail. (Rec., 414.)

These articles are briefly referred to, after which the opinion proceeds to declare them inconsistent with the idea of an absolute cession of the "leased district," saying:

> Why *so many things* should be annexed to a simple cession of land if the transfer was meant to become absolute does not appear. Enough does appear to make an unqualified transfer seem inconsistent and repugnant, and though some of the conditions and qualifying words leave room to suppose that no reservation as to title or an interest in the land was

> intended to be made, taken as a whole the language following the cession is inconsistent with the absoluteness of the transfer and offers a glaring want of reciprocity and equality between the parties. There is at least enough of *contradiction and inequality* to create the belief that, as the parties did not see fit to make the cession for so much money to be paid and stop at that, something else was intended by one party or the other, or by both. (Rec., 415.)

The expression "so many things" is vague, and unfortunately the opinion does not state what bearing any one of these "many things" has on the cession so as to affect its absolute character, nor does it point out the "contradiction and inequality" which these "many things" involve, and which indicate that the cession could not have been intended to be absolute. It even leaves it doubtful as to what the "many things" are.

The reference to the "conditions" and "qualifying words" is also vague, but the idea appears to be that some of the provisions for the "many things"—which the learned judge says are "annexed" to the cession—are consistent with an absolute cession, while others are not; but as he does not point out which provisions belong to the one class and which to the other, nor what the fundamental difference between the two is, his statement does not greatly aid us in understanding the matter.

But what, after all, are the "many things" "annexed" to the cession, which the learned judge thinks prevent the transfer from becoming absolute? Taking his words as they stand, the "many things" must be the matters referred to in his four preceding paragraphs, viz, the various other provisions of the treaty, and yet none of

these would seem to be "annexed to the cession," other than in the broad sense of being included in the same treaty, except, possibly, the provisions for the disposition and uses of the consideration to be paid for the cession. By "annexed" the learned judge must mean something more than being merely contained in the same instrument. He must mean that the "things" which are "annexed" affect or control the cession in some way so as to make it other than it would be if they were not "annexed" thereto. Now, it may be stated with confidence that there is not a single provision in the treaty, from one end of it to the other, that touches in the remotest degree the cession of the "leased district," except the provisions of Articles III and XLVI, in regard to the disposition and uses of the consideration, and those of Articles X and XLV, in regard to the preexisting obligations of the United States and rights and privileges of the Choctaws and Chickasaws; and further, that none of these provisions can possibly affect the character of the cession in the least degree.

Articles X and XLV are as follows:

> ARTICLE X. The United States reaffirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations, entered into prior to the late rebellion, and in force at this time, *not inconsistent herewith;* and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation from and after the close of the fiscal year ending on the 30th of June, in the year 1866.
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> * * * * *

ARTICLE XLV. All the rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby, declared to be in full force, *in so far as they are consistent* with the provisions of this treaty. (14 Stats., 774, 779.)

Undoubtedly, if the cession of the "leased district" was not absolute, the treaty obligations of the United States toward the Choctaws and Chickasaws in regard to that district were reaffirmed by Article X, and the rights of those nations in the said district continued in force under Article XLV, but the provisions of those articles are of no effect in determining whether or not the cession was absolute, for, if absolute, it was inconsistent with those provisions, and excepted from their operation. The opinion says that "these articles are consistent with the cession for Indian purposes," which is true, but as they are equally consistent with an absolute cession they may be left out of consideration altogether.

The provisions of Article III, concerning the disposition and uses of the fund, have already been given in full above. They relate to certain laws, rules, and regulations to be made by the Choctaws and Chickasaws for the benefit of the persons of African descent resident with them, and to the possible use of this fund for the benefit of such persons in case such laws and regulations should not be made. That the Choctaws and Chickasaws were called upon to make such laws and regulations could have had nothing whatever to do with the fact that they also

ceded certain land to the United States or with the character of the cession. The propriety of calling upon them to make such laws and regulations, or of using the fund for the benefit of the persons of African descent in case such laws and regulations were not made, was precisely the same whether the cession for which the fund was the consideration was absolute or in trust. Although these provisions are introduced by the words "provided that," they relate to a matter so wholly distinct from the cession, that it can not have been intended that they should operate as conditions, or that unless they were carried out there would be no cession at all, i. e., that such rights of the Choctaws and Chickasaws in the land as remained to them after its lease in 1855 would revert to them. Moreover, even if these provisions could conceivably have been intended to operate as conditions, yet, as it is not denied that they have been carried out, they can not have the effect of causing a reverter, and no other possible effect upon the cession can be ascribed to them.

Article XLVI provides for the immediate payment to the Choctaws and Chickasaws, subject to possible ultimate repayment, of $200,000 of the moneys stipulated to be paid "for the cession of the leased district and the admission of the Kansas Indians among them," the balance to remain in the Treasury and bear interest, payable annually. This is the article to which the opinion refers when it speaks of—

> the recitals which, providing for the repayment of a part of the money after the admission of the Kansas Indians and the application of the other part of the consideration to the support of a government

which included the new population proposed to be incorporated, continued the country for the use of Indians. (Rec., 421.)

This article refers to money coming from two sources, viz, "the cession of the leased district," under Article III, for which the United States was to pay, and "the admission of the Kansas Indians among them," under Article XXX, to be paid for out of the funds of those Indians, as provided in Article XXXVII. There is no room for a shadow of doubt as to this, "the admission of the Kansas Indians among them, being precisely what Article XXX provides for in express terms; but the learned judge seems to have overlooked this when he said the recitals of Article XLVI "continued the country for the use of Indians." This was true of the country east of the ninty-eighth meridian, where the Kansas Indians were to settle, but this article could have no effect whatever upon the ultimate disposition of the leased district. The learned judge has evidently mixed up two matters which are wholly distinct, and has treated the article as if it read, "the cession of the leased district and the admission of the Kansas Indians *into it;*" but it reads "admission of the Kansas Indians *among them*," i. e., among the Choctaws and Chickasaws, and into the districts occupied by them, east of the ninety-eighth meridian, as stated in Article XXX.

It appears, then, that *none* of the "many things annexed" to the cession have any bearing on its character whatever; that *none* of them "make an unqualified transfer seem inconsistent and repugnant," and that "taken as a whole the language following the cession" *is not* "inconsistent

with the absoluteness of the transfer," and *does not* offer "a glaring want of reciprocity and equality between the parties," nor involve "contradiction and inequality;" and the opinion does not point to a single "thing" in the treaty to warrant its statements in this respect. That the Choctaws and Chickasaws were not on an equality with the United States politically or intellectually, or in point of strength and resources, is true; but this can not be the lack of equality to which the opinion refers. What is meant is that *the terms of the treaty* are not reciprocal and equal, as between the parties, if the cession is absolute, i. e., that one party gives more than the value of the consideration that it receives. If this be true at all, it is not because of any of the "things" which are "annexed" to the cession, but simply because $300,000 was an inadequate price for the interests conveyed, and this the opinion does not say. The learned judge says, in effect, that $300,000 was inadequate as a consideration for a cession of "all interest" in the land, but the actual cession made in 1866 was not of "all interest," but only of the very limited interest that remained to the Choctaws and Chickasaws after the "lease" of 1855. The learned judge also intimates that the "things," or some of them, "annexed" to the cession would involve "contradiction and inequality" if the cession were absolute, but it has been shown that the other provisions of the treaty have no bearing on the cession, and can not possibly indicate its character.

Another matter influencing the mind of the learned judge, in connection with the "contradiction and inequality" (which he does not point out, but whose existence

he simply asserts), is that, "as the parties did not see fit to make the cession for so much money to be paid and stop at that, something else was intended by one party or the other, or by both." The phrase "stop at that" may mean "confine the treaty to that one matter," or it may mean "place no restrictions on the disposition of the consideration money." If the first, the answer is that a treaty covering the seven stipulations had to be made in any event, and it was simpler to cover everything by one treaty; if the second, the answer is that the disposition of the money was adopted as a convenient mode of insuring compliance, in one way or the other, with the requirements of the ~~fifth~~ third stipulation, and, whichever be meant, the further answer is that neither the provisions as to the consideration for the cession nor any other provision of the treaty can possibly affect our understanding of the character of the cession.

Looking at the matter practically, to "make the cession for so much money to be paid and stop at that" was precisely what the parties did, as far as the cession was concerned. What else they did was altogether separate and apart from the cession.

The learned judge's "belief" as to what the parties intended suggests a pertinent question. If the parties intended a cession in trust, why was not the trust stated in distinct terms? Why should not the literal wording of the treaty express the intention of the parties? The opinion gives no answer to this question, and until it is satisfactorily answered the reasonable understanding of the matter must be that the language of the treaty,

plainly importing an absolute cession, expresses precisely what the parties intended.

The jurisdictional act gives no power to reform the treaty.

The other ground assigned by the court for going behind the plain words of cession in Article III remains to be considered. The opinion says:

> The act conferring jurisdiction is misleading and delusive if, without the power to direct the court to consider the treaty as a contract, and apply the rules which obtain in equity to ascertain its meaning, Congress has shifted the responsibility of reaching the intent of the treaty upon the court. The inquiry being always open to the Indians how they understood their treaty as a contract, it was competent for Congress to direct the consideration of extrinsic facts in explanation of the intent. This includes the examination of matters historically true and all circumstances throwing light upon the intent and the reason and justice of the matter, and the uses in this case to which the small consideration was to be put upon its ultimate payment, so that the treaty should not lead to injustice, oppression, or absurd consequence. (Rec., 409.)

The jurisdictional act provides as follows:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws and to render judgment thereon, it being the intention of this act to allow said Court of Claims jurisdiction, so that

> the rights, legal and equitable, of the United States and the Choctaw and Chickasaw nations, and the Wichita and affiliated bands of Indians in the premises, shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim. * * * *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands or any part thereof. (28 Stats., 898.)

This language is much the same as that of the act of February 25, 1889 (25 Stats., 694), in regard to the "Old Settlers," although there the effect of the language was perhaps broader, the intention being stated to be "to allow the said Court of Claims *unrestricted latitude* in adjusting and determining the said claim, so that the rights," etc. Under this broad language the claimants asked that a certain treaty should be considered as a contract in every respect similar to one made between private parties, and that they should be relieved from its provisions on the ground of duress and fraud, but this court held that the jurisdictional act, broad as its language was, provided for a strictly judicial proceeding, and did not clothe the court with power to annul a treaty on the ground of fraud or duress in its execution. It said, moreover:

> There is nothing in the jurisdictional act of February 25, 1889, inconsistent with the treaty of 1846 (or any other), and nothing to indicate that Congress attempted by that act to authorize the courts to proceed in disregard thereof. Unquestionably a treaty

> may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political, and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the Government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference. (*United States* v. *Old Settlers*, 148 U. S., 427, 468.)

Now, if a court can not, under a jurisdictional act of even broader language than the present one, go behind a treaty on the ground of duress or fraud, neither can it reform a treaty on the ground that its language does not express the intention of the parties. It is undeniable that, as the court below states, a court of equity has power to reform a written instrument so as to carry out the intention of the parties and prevent fraud or oppression. It is true that a deed absolute on its face may be shown to be a mortgage, or to be subject to conditions; but it is not true that a treaty can be dealt with in any such way. A treaty is "the law of the land," and must control the court; the court can have no control over the provisions of a treaty. The court may construe the language of a treaty, but in the present case the court below has gone far beyond construction and has attempted reformation.

Had the words of cession been such as might properly convey either a trust estate or an absolute estate, or had the cession been stated to be for the permanent settlement of Indians, then there would have been room for construction as to what character of estate was intended, or

as to what disposition of the land was consistent with such permanent settlement, but as it is the language is too plain to leave any room for construction.

The court below, however, thinks the present case an exception to the general rule, because, in its opinion, unless the jurisdictional act authorized it to go behind the plain language of the treaty the act was useless. The opinion says:

> The act conferring jurisdiction is misleading and delusive if, without the power to direct the court to consider the treaty as a contract and apply the rules which obtain in equity to ascertain its meaning, Congress has shifted the responsibility of reaching the intent of the treaty upon the court. (Rec., 409.)

While these words are perhaps a trifle obscure, it is evident that "to consider the treaty as a contract" must mean to subject it to the same treatment that any ordinary contract would receive in a court of equity, e. g., to treat a grant, absolute on its face, as a grant in trust, or as subject to conditions, or to avoid it altogether on account of duress or fraud; yet the last of these things is precisely what this court has said in the Old Settlers' case can not be done under such a jurisdictional act, and if this can not be done, the other things can not be done either, or, in other words, the court is not at liberty "to consider the treaty as a contract."

The act not ineffective, though no power to reform given.

The fact that the act did not authorize the court below to go behind the treaty, or to reform it, does not, however, make the act either "misleading" or "delusive."

As the Wichita and affiliated bands of Indians claimed compensation on account of certain alleged possessory rights in the lands of the reservation (see Wichita Agreet., Art. V; 28 Stat., 896), the act provided that these rights, legal and equitable, should be fully considered and determined, and the court below has considered and determined them. Besides this claim of the Wichita and affiliated bands, the Choctaws and Chickasaws claimed to have "some right, title, and interest" in and to the lands ceded in the agreement, and jurisdiction was given to consider and determine these rights also. What the claims of the Choctaws and Chickasaws were, the act did not state, though it did provide against any inference of a confession of the validity of such claims. There is nothing in the act to show that Congress knew that these claims contravened the plain language of the treaty of 1866, or that sustaining the claims would involve reforming the treaty. Even if the action of a former Congress in regard to a similar claim (act of March 3, 1891; 26 Stat., 1022–1025), and the representations made to it (H. Report 3147, Fifty-first Congress, first session; Senate Mis. Doc. 107, same session; Senate Mis. Docs. 82 and 95, and Senate Report 552, Fifty-second Congress, first session; H. Report 1661, same session), be held to have affected the Fifty-third Congress with a knowledge of the character of these claims, as previously presented, the fact that the act gave no authority to disregard the terms of the treaty of 1866 indicates that Congress intended to prevent any claims from being considered which involved a substantial reformation of the terms of any treaty.

The mere fact that the parties who call for a reformation of the treaty of 1866 are Indian communities can not alter the case. The rule which takes into account the fact that in the making of treaties between the United States and such communities "the parties are not on an equal footing" (*Choctaw Nation* v. *United States*, 119 U. S., 1, 28) is a rule of interpretation, but it does not warrant reformation where the language is capable of but one interpretation.

II.

THE CESSION OF THE "LEASED DISTRICT" IN 1866 WAS AN ABSOLUTE ONE.

Assuming, for the sake of the argument, that the jurisdictional act permits an inquiry as to whether the cession made by Article III of the treaty of 1866 was intended to be less absolute than its language would indicate, the second ground of the appeal will now be considered.

The conclusion of the court below.

The opinion of the court below reviews the various dealings between the United States and the Choctaws and Chickasaws down to and including the treaty of April 28, 1866, and puts its construction upon them. Of the cession made by Article III of that treaty it says:

> If the transaction had been between individuals, and especially between guardian and ward, inquiry would at once arise how it came that one of the parties, and that party the ward, should for a consideration of $300,000 part with all interest in nearly 8,000,000 acres of land worth about $8,000,000

> (according to the value put by the grantee at the time upon land adjoining the ceded territory) and at the same time bargain to give from other possessions tracts of more than 300,000 acres to get the money, or, failing to yield these tracts to the third persons who by the arrangement were to become the beneficiaries, leave themselves in position to surrender indefinitely land enough for 8,000 people to cultivate besides conferring upon them other rights. But under this treaty neither the integrity of the sovereign nor the good faith of the guardian can be questioned. In looking for the proper objects, then, which we must suppose actuated the sovereign as guardian the statements and situation of the parties, the amount and value of the grant considered with reference to the consideration, the benefits to be conferred and where they were to go, and the ends sought to be accomplished from all the parties possessed of land, may be considered in determining whether the cession was or was not attended with any underlying trusts or uses. (Rec., 406.)

The opinion then goes on to discuss what it considers the evidence of the object of the cession, the attendant circumstances, and various subsequent proceedings, and finally reaches this conclusion:

> We hold the cession in the treaty of 1866 was not intended to divest the Choctaws and Chickasaws of all their interest in the leased district, but was intended to enlarge the scope of the ninth article of the treaty of 1855. Hence a trust must be implied in favor of the claimants under the terms of the grant. * * * The Government had the right to settle Indians permanently on the lands mentioned in the agreement, but not to divert the proceeds of the sale of the lands from the Choctaw and Chickasaw nations to other Indians. (Rec., 427.)

Before reviewing the evidence of the object of the cession, or the attendant or subsequent circumstances and proceedings, it is necessary first to call attention to a very serious error of fact into which the court below has fallen, and which has presumably influenced its decision. The first of the above extracts, that from page 406 of the record, is clearly equivalent to a statement that according to the view taken by the United States in the present case, the Choctaws and Chickasaws did, by the treaty of 1866, "for a consideration of $300,000, part with all interest in nearly 8,000,000 acres of land," i. e., the land between the ninety-eighth and one hundredth meridians and the Canadian and Red rivers. As a matter of fact, the consideration for which they parted with "all interest" in that land was not $300,000, but $1,100,000, i. e., $800,000 in 1855, when they leased it *permanently* to the United States for the settlement of other Indians thereon, reserving to themselves only the right to settle in the district, and $300,000 in 1866, when they parted with all their remaining interest. To conform the statement of the court below to the actual facts, therefore, $1,100,000 would have to be substituted for $300,000 as the consideration for which "all interest" in the land in question was parted with.

This error in the statement of the court below is the more remarkable because the opinion had previously referred to the lease of 1855, and had said enough to show that $800,000 must have been paid for it (Rec., 391), although the opinion did not state any definite conclusion as to this. It would seem as if the learned writer of the opinion, when he came to this cession of 1866, forgot all

about the lease of 1855, and treated the cession as if the United States had then for the first time acquired an interest in the land ceded to it, whereas in point of fact it already had the right to permanently settle the Indians from a very large region upon it, a right which it might, if it saw fit, so use, by filling up the entire district with such Indians, as to exclude the Choctaws and Chickasaws from all enjoyment of the land whatever.

Whether the ultimate conclusion of the court below would have been the same if it had borne in mind the fact that the interest which the Choctaws and Chickasaws parted with in 1866 was very far from being complete, and might easily have become purely nominal, is a matter of speculation. The one certain fact is that in reaching its conclusion the court has overlooked certain important premises; and of course such a conclusion can not command the same degree of respect as if all the premises had received their due consideration.

The arguments against the conclusion of the court below.

In proceeding to attack the conclusion of the court below it will be necessary to consider, first, what sort of an interest it was which the Choctaws and Chickasaws had when they made the cession to the United States in 1866, and what was the total consideration which the the United States gave for whatever interest it acquired in the land ceded in 1866; secondly, the circumstances attending the cession; and thirdly, all subsequent acts and declarations of the parties which have been thought to affect the matter.

In considering the first point it is necessary to review

the various treaties and negotiations with the Choctaws and Chickasaws prior to that of 1866, in order to show conclusively that the United States had already acquired for a large consideration a very important interest in the "leased district," so that it could at any time have excluded the Choctaws and Chickasaws from all beneficial interest therein.

This branch of the argument may be subdivided as follows:

A. The amount of the consideration paid by the United States for the "lease" of 1855.

(1) Whether the Quapaw cession of 1818 extended west of the one hundredth meridian.

(2) Whether the cession to the Choctaws in 1820 extended west of that meridian.

(3) Whether the treaty of 1830 annulled that of 1820.

(4) Whether the quitclaim of 1855 was the renunciation of a valid claim, or a correction of the cession of 1820 in conformity with the intention of the parties.

B. The nature of the title acquired by the United States under the cession of 1866.

(1) What provisions of the treaty of 1866 were intended to carry out the fifth stipulation announced at Fort Smith in 1865.

(2) The nature of the cession of 1866.

A.

THE AMOUNT OF THE CONSIDERATION PAID BY THE UNITED STATES FOR THE "LEASE" OF 1855.

Article 9 of the treaty of June 22, 1855, covers a quitclaim and relinquishment by the Choctaws, alone, of all

their right, title, and interest in lands west of the one hundredth meridian, as well as a lease by the Choctaws and Chickasaws, together, of the country between the ninety-eighth and one hundredth meridians, and article 10 provides as follows:

> In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct.

It was contended in the court below that the whole sum of $800,000 was paid for the quitclaim alone, but the court below has manifestly declined to sustain this contention, and has expressly held that the claim for land west of the one hundredth meridian was a claim of the Choctaws alone, and that the quitclaim was made by them alone and not by the Chickasaws (Rec. 391–396), so that as regards these latter the money paid them ($200,000) was paid exclusively for the lease, and not for the quitclaim at all. The court below has also distinctly stated that "the rights of the Choctaws and Chickasaws as between themselves had been fixed by agreement, with the consent of the Government, in the proportion of three-fourths to the former and one-fourth to the latter tribe in all the land to which either tribe could lay claim." (Rec. 397.) The inevitable conclusion from this is that, as the Choctaws received for the lease precisely three-fourths of the total consideration and the Chickasaws one-fourth, this consideration must

have been paid for the lease exclusively; but this the court below does not seem to admit, although it has carefully avoided committing itself as to how much of the $600,000 paid to the Choctaws in 1855 was for the lease and how much for the quitclaim. It may well be that the court below really held that no substantial portion of the $600,000 was paid for the quitclaim, but whatever was the view of the court, it is clear that if anything at all was paid for the quitclaim, then the Choctaws did not receive their fair proportion of the money paid for the lease, and there is no indication whatever that they were or were intended to be treated at all less favorably than the Chickasaws in this matter.

Precisely what correspondence passed between the United States and the Choctaws in 1855 will be considered below. It is expedient to take up the whole matter chronologically and to point out, first of all, the reason why the $600,000 were paid to the Choctaws exclusively for the lease, and not at all for the quitclaim, viz: that the quitclaim was not the relinquishment of any real or substantial claim, but merely the correction of an error in the description of the land ceded to the Choctaws by the treaty of October 18, 1820, a correction necessary in order to make the terms of that cession conform to the intention of the parties at the time the cession was made.

The court below has held that the quitclaim of 1855 was a relinquishment of an interest in lands west of the one-hundredth meridian, which the United States really intended to cede to the Choctaws by the treaty of October 18, 1820, but which were recognized as Spanish in the

previously made, but subsequently ratified, treaty with Spain (made February 22, 1819, ratified February 19, 1821), and consequently were excluded by the treaty of September 27, 1830.

To demonstrate the error of the court below, as to the intention of the United States in the treaty of 1820, it is necessary to turn to the instructions given to the commissioners who made that treaty, and to their report of what they had done. As, however, they were instructed to cede, and reported that they had ceded, a portion of the Quapaw cession of 1818 only (Am. State Papers, Ind. Affs., Vol. II, 231, 241), their instructions and report can not be properly understood without first considering the extent of that Quapaw cession, by which the United States obtained that right of occupancy which it undertook to grant to the Choctaws in 1820.

(I.)

The Quapaw cession of 1818 did not extend west of the one hundredth meridian. (See the second assignment of error.)

The language of the Quapaw treaty of August 24, 1818 (7 Stat., 176), describing the cession, is as follows:

> Beginning at the mouth of the Arkansaw river; thence extending up the Arkansaw to the Canadian fork, and up the Canadian fork to its source; thence south, to Big Red river and down the middle of that river, to the Big Raft; thence * * *

The treaty states an impossible boundary.

In comparing this description with a map of to-day, while the eastern boundary is clear enough, the western

is at once seen to be impossible; not merely because the source of the Canadian Fork, or Canadian River, as it is now called, is about 2 degrees west of the westernmost point of the Red River, so that a line can not be drawn "south" from the source of the Canadian to any point of the Red River, but also because, even disregarding the word "south," no line drawn from the source of the Canadian to even the westernmost point of the Red River would serve as a boundary of land running westward to the source of the Canadian. The source of the Canadian lies so far north, and the course of that stream is so irregular, that such a line must cross the Canadian itself several times, the last point of crossing (the only point from which the line could serve as a boundary of land lying between the two streams) being about longitude 103° 47′ west, or about 250 miles below the source of the Canadian. In other words, if the word "source" in the treaty be taken, as the court below has taken it, to mean the actual source, then not merely must the word "south" be taken to mean "southeastwardly," but the whole description would have to be reconstructed, so as to read as follows:

> Thence extending up the Arkansaw to the Canadian Fork, and up the Canadian Fork to [longitude 103° 47′ west, being 250 miles below] its source; thence south [16° 30′ east] to Big Red River, and down the middle of that river.

It is submitted that such a departure from the express words of the treaty is inadmissible, if, as is the case, the intention of the parties to the treaty can be ascertained and a boundary can be run in accordance with that intention.

Interpretation being necessary, the understanding of the parties, in so far as it can be ascertained, should prevail.

The rules of law which govern the interpretation of treaties are as well established as they are familiar, and may practically be summed up by saying that, when it is necessary to resort to interpretation, what the parties to the treaty themselves meant by the words they used should be ascertained, and the words should be given that meaning as far as possible.

> In the interpretation of a treaty, or of any other deed whatsoever, the question is to discover what the contracting parties have agreed upon—to determine precisely, on any particular occasion, what has been promised and accepted—that is to say, not only what one of the parties intended to promise, but also what the other must reasonably and candidly have supposed to be promised to him—what has been sufficiently declared to him, and what must have influenced him in his acceptance. Every deed, therefore, and every treaty, must be interpreted by certain fixed rules calculated to determine its meaning, as *naturally understood by the parties concerned at the time when the deed was drawn up and accepted.*
>
> * * *
>
> Since the sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed, whenever we meet with any obscurity in it we are to consider *what probably were the ideas of those who drew up the deed*, and to interpret it accordingly. This is the general rule for all interpretations. (Vattel, Law of Nations, Bk. II, §§ 268, 270.)

In *Marryat* v. *Wilson* (1 Bos. and P., 430, 438), Eyre, C. J., after pointing out that the responsibility for the

consequences of a treaty rested with those who had advised it, and not with the courts who might be called on to interpret it, said:

> We are not even the expounders of treaties. This treaty is brought under our consideration incidentally as an ingredient in a cause in judgment before us; we only say how it is to be understood between the parties to this record. This we are bound to do; and we have but one rule by which we are to govern ourselves. We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and from the context, *the true intent and meaning of the contracting parties*, whether they are A and B, or happen to be two independent States.

It is certainly true, as stated by Vattel and quoted by the court in *Geofroy* v. *Riggs* (133 U. S., 258, 270), that a treaty "ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory;" but the words "its effect" (*son effet*) obviously mean the effect which the parties intended at the time to give to it, and not some other and further effect, which could not possibly have been within the contemplation of the parties at the time. An interpretation which would make a treaty cover what the parties did not intend that it should cover would be as improper as one which made it vain and nugatory. The intention of the parties must control, so as to prevent an unwarranted extension of scope just as much as an unwarranted limitation.

> It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed,

> and for that purpose all of its provisions must b
> examined in the light of attendant and surroundin
> circumstances. To some terms and expressions
> literal meaning will be given and to others a large
> and more extended one. * * * The inquiry i
> all such cases is as to *what was intended* in the law
> by the legislature, and in the treaty by the contract
> ing parties. (*In re Ross*, 140 U. S., 453, 475.)

Applying this doctrine to the present case, it is clear in the first place, that interpretation must be resorted to If the relative position of the Canadian and the Red River were such that a line could be drawn south from the source of the former to any point of the latter, so as to form a western boundary of the land between the two streams, there would be no opportunity for interpretation. The language of the treaty is so plain that if the actual geography made it possible to lay off a district with the boundaries called for by the treaty, it would have to be done, whether the parties to the treaty were acquainted with the geography or not. The plain language of the treaty, "the law of the land," would have to control, and no court would be authorized to inquire whether the parties had really meant what they had said. In the present case, however, the actual geography is such that no district can be laid off with the boundaries called for by the treaty, because the line required can not be drawn, so that interpretation *must* be resorted to, and the only question is as to what that interpretation shall be. By the settled doctrine the intention of the parties, in so far as it can be learned, must rule in the interpretation, and if it can be shown, as, it is submitted, it clearly can be, that the intention was to run a line south from where

they believed the source of the Canadian to be, viz, on or just east of the one hundredth meridian, where such a line can easily be run, then this intention should prevail.

The words used in the Quapaw treaty, "up the Canadian fork to its source, thence south to Big Red river," indicate, first, that the Canadian was not regarded as a river by itself, but as a mere fork of the Arkansas; and, second, that the source of the Canadian was believed to be due north of some point on the Red River east of the source of the latter, or, in other words, that the Canadian rose farther east than the Red River. Had the words been "thence south to the *source* of the Red River," they would have indicated a belief that the Canadian rose due north of the source of the Red; but the words "south to Big Red river" clearly mean a point below, to the east of, the source of that stream. Hence the full meaning of the words would be expressed thus: "Up the Canadian Fork to its source, which we believe to be farther east than that of the Big Red River, thence south to the latter river."

So much being clear, it remains to ascertain at what point farther east than the source of the Big Red River the parties to the treaty of 1818 believed the source of the Canadian to be. As to this it is submitted that *by the "source" of the "Canadian fork" the parties to the Quapaw treaty of 1818 understood a point on that stream at, or just east of, 100° west longitude, from which point a line can be drawn due south to the Red River.*

As the western boundary of the Quapaw cession had not been surveyed, it is necessary to determine the understanding of the parties to the treaty in regard to that

boundary, an understanding which is to be ascertain
from three things, viz, the map on the face of the treat
itself, the general belief of the day as to where the sour
of the Canadian was, and the understanding as to ho
far west the Quapaw country extended.

The map at the head of the Quapaw treaty is a part o
the treaty.

It is a well-settled rule of law that if a deed or treat
refers to a map or plan the latter is to be given the sam
effect as if it had been expressly made a part of the in-
strument (*McIver's Lessee* v. *Walker*, 9 Cr., 173; *Nomet*
v. *Lee*, 2 Black, 499; *Craigin* v. *Powell*, 128 U. S., 691,
696; *Jefferis* v. *Omaha Land Co.*, 134 U. S., 178, 194;
United States v. *Texas*, 162 U. S., 1, 37), the extent to
which the map will control depending, of course, upon
the extent to which it is relied on in the instrument
which refers to it. Thus, in *United States* v. *Texas* it
was held that the words in the Spanish treaty of 1819,
following a statement of the boundary line between the
dominions of Spain and the United States, "the whole
being as laid down in Melish's map of the United States,
published at Philadelphia, improved to the 1st of Janu-
ary, 1818," meant that the boundary was to run substan-
tially as shown by that map; but that where the map
was at fault the actual geography was to rule, especially
as the treaty itself had provided for a survey, the results
of which were to have the same force as if inserted in
the treaty. In the present case the treaty itself, the very
instrument executed by the parties, contains, as an inte-
gral part of itself, in the most prominent place, viz, the

upper portion of the first page, a map entitled "Map of the territorial limits of the Quapaw cession." U. S. Exhibit No. 10, *infra*.) It is true that the only boundary lines which are specifically referred to in the treaty as being "on the above map," are those which bounded the eastern portion of the cession; but there can be no doubt that the whole map represents the understanding and intention of the parties to the treaty, and that the map was embodied in the treaty in order to leave no doubt as to the extent of the country ceded thereby.

The treaty map is based on Pike's chart.

This map shows the "Canadian Fork" rising about 40 miles from a point on the Red River, and flowing north-east for a distance a little short of 200 miles on a straight line, but somewhat more than that by the course of the stream itself. A line about 40 miles long is shown as drawn from the source of the Canadian due south to the Red River. There are no indications of latitude or longitude, but the map is so obviously based on Plate I, of Pike's Chart of the Internal Parts of Louisiana (U. S. Exhibit No. 2, *infra*), being drawn to the same scale (40 miles to the inch) and showing substantially the same general topographic features, that the latitude and longitude of the latter may properly be referred to in order to show what was meant by the former. This treaty map was made by René Paul, who had previously made the map of the Indian country (Rec., 159), accompanying Chouteau's notes, dated February 21, 1816. Paul seems to have been, like Chouteau, a native of the Louisiana Territory, and to have been personally familiar with the

eastern part of the country shown in his map, but for the western part he manifestly relied upon Pike. Pike's chart, which was prepared by Antoine Nau, a draftsman in the employ of the Government (see Pike's letter of May 27, 1808, in Pike's Expeditions, p. lxi, Coues' ed.), was published with the first complete edition of Pike's book in 1810. It is in two plates, each of which has the degrees of latitude and longitude marked at its edges, but not across its face, and it is probably due to this fact that the numbers of the degrees of longitude on the top and bottom do not agree, those at the top being each marked one degree higher than they should be. This fact is shown by the position of the north and south line on each plate, and also by the indications of latitude. If lines were drawn from the numbered points on the bottom to the correspondingly numbered points on the top they would not run north and south but would slant off to the east. Much of what appears on this chart is conjectural, but if the position of those portions which represent country well known in 1810 be observed, it will be seen that the numbers shown at the bottom of the chart indicate most nearly the actual longitude. Thus, the first number at the right on the bottom of Plate I, indicating the thirteenth meridian from Washington (77° west from Greenwich[1]) corresponds with the number

[1] The actual meridian of Washington is 77° 2' west from Greenwich, but as a matter of convenience, to avoid using two sets of meridian lines, the seventy-seventh meridian was treated as that of Washington. E. g., the Spanish treaty of 1819, art. 6, says, "the degree of longitude 100 west from London and 23 from Washington," while the meridians on maps counting from Washington were really Greenwich meridians, with a difference of 77 degrees.

14 at the top of the sheet, and the number 23 at the bottom of the sheet, indicating the meridian 100° west from Greenwich, corresponds with the number 24 at the top of the sheet. A line drawn across the face of the sheet from the figure 23 at the bottom to the figure 24 at the top would run very slightly west of the point where the source of the Canadian is indicated; or, in other words, this chart shows the Canadian as rising at the one hundredth meridian of west longitude, and the treaty map, being so evidently based on Pike's chart, must be understood as indicating the same position of the source of that stream.

The standard maps of the day placed the source of the Canadian about the one hundredth meridian.

As to the authority of Pike's chart, it may fairly be said to have been, in spite of all its defects, the best map of that particular region that had yet been made. That it was generally received as authority is shown by the fact that it was substantially followed in all later maps, both English and American, until the actual geography of the region was discovered and made known by Major Long. Thus Melish, who published in 1816, and again in 1818 and 1820, what was regarded as the standard map of the United States, shows the Canadian as Pike had shown it, i. e., rising just east of the one hundredth meridian, and emptying into the Arkansas near the ninety-seventh, the only departure from Pike's delineation being that Melish showed the stream as flowing first southeast and then northeast, rather than continuously northeast. Darby's map of Louisiana, published

in 1818, resembled Melish. The English map maker Pinkerton (1815) and Arrowsmith (Atlas to Thompson's Alcedo, 1816) adopted Pike's delineation of the course of the Canadian, but placed it about 2 degrees farther east, thus bringing the mouth of the stream nearer its actual location. Another proof of the reputation of Pike's map is that it was the only one used by Long in his expedition of 1819–20, at least as far as the country about the Rocky Mountains was concerned. (See Long's reports, Rec., 266, 275.)

Pike's first expedition, in 1805–1806, had taken him up the Mississippi, and the second, in 1806–1807, by the Missouri and Osage rivers; thence across country to the Republican Fork of the Kansas; thence to the Arkansas, about the one hundred and second meridian, and up that stream to its sources, and thence to Santa Fé, whence the Spaniards conducted him through New Mexico and Texas to Natchitoches. He does not seem to have ever passed through any part of the Quapaw cession except the extreme eastern portion by the Mississippi, but his subordinate officer, Lieutenant Wilkinson, came down the Arkansas in canoes, with some of the exploring party, passing the mouth of the Canadian December 29, 1806, and made a report which appears as Chapter V, Coues' edition of the second volume of Pike's book, and as Document No. 2 in the appendix to the edition of 1810. Pike's knowledge of the geography of the Arkansas below the one hundred and second meridian (as the note on Plate II indicates), and of the Canadian, was manifestly, therefore, derived in the main from

Wilkinson's "survey" (see Pike's Expeditions, Vol. II, p. 518, Coues' ed.) and investigations.

While Pike's map shows comparatively little of the Canadian River, indicating it as rising at the one hundredth meridian and emptying into the Arkansas at about longitude 96° 45′ west (the mouth is actually at about the ninety-fifth meridian), this is really more than is shown in any previous map. Before Pike's time the standard map of Louisiana seems to have been De l'Isle's "Carte de la Louisiane et du Cours du Missisipi," the first edition of which is map No. 38 in volume 2 of De l'Isle's Atlas Nouveau (put in evidence by the attorney for the Chickasaws; see exhib. 28, Rec. 81–2), which is believed to have been published in 1741. All the later eighteenth century maps are plainly based on De l'Isle, and the revised edition of 1782 was referred to as an authority by Messrs. Pinckney and Monroe in 1805 and Mr. Adams in 1818, when presenting to the Spanish minister a statement of the claims of the United States as to the western boundary. (Am. State Papers, For. Relns., Vol. II, p. 664; Vol. IV, p. 471.) This map of De l'Isle (a reproduction of which is annexed to this brief), like all the other maps earlier than Pike's, does not give the name Canadian Fork or River to any stream at all, nor does it show any branch whatever entering the main stream from the west or south, but merely some short, nameless branches, coming *from the north*. Pike's knowledge of the Canadian could not, therefore, have been gained from other maps, but must have been acquired from persons who knew something of the stream, and his notes as to the

points where the prairies begin, where the waters begin to be navigable, where Fabry wintered, etc., show that he must have made considerable inquiry into the matter. At all events, his chart certainly represents what was known and also what was currently believed in regard to the geography of the region shown at the time the map was made, and it does not appear that in 1818, when Paul made the treaty map, there was any increased knowledge or change in belief.

Moreover, Pike's map shows (what the treaty map does not run far enough west to show) that the actual source of the Canadian was known, but was believed to be the source of the Red River, the course of the former stream, below a point a comparatively short distance from its source, being unknown. This peculiar fact merits attention, as it shows conclusively that when the words "up the Canadian fork to its source" were used in the treaty of 1818, the actual source of that stream could not have been meant, it being firmly believed to be the source of another stream.

Explanation of this error in the maps.

The Canadian River rises in the Raton Pass, near the northern border of New Mexico, about 104° 30′ west longitude, being there known as the Red River.

This Red River flows south till it is joined by the Cimarron, which rises a little east of Taos, and below this confluence the stream is known as the Canadian. Still farther down, about where the general course of the Canadian begins to be southeastward, it is joined by a

small stream called the Rio Mora. For about the first half of its course the Canadian flows through territory the Spanish claim to which was finally established by the treaty of 1819, while the further course is through a part of the Louisiana cession, but neither French nor Spaniards settled on the stream, nor even systematically explored it, as its extreme shallowness (parts of it becoming altogether dried up in the summer time) would have prevented its ever becoming an avenue of trade, even if the Spaniards had cared more about trade than they did, or if the presence of the Apaches, Lipanes, and other wild tribes, through whose habitat the Canadian flowed, had not made regular trade along that stream an impossibility.

Owing to these causes the upper Canadian was practically an unknown stream down to the publication, in 1822, of the narrative of Long's expedition of 1819–20; for although the Spaniards were familiar with its sources, as also with those of the Arkansas, they could only guess as to the connection between those sources and the rivers which the French knew in Louisiana, and hence Humboldt's map of New Spain (U. S. Exhibit No. 1, *infra*), based upon his own observations in that country, and upon the data existing in 1804, gave to the streams at their sources the local names, and added notes as to their supposed identity with streams farther east. About latitude 39° north he shows the Rio de Napestle for a certain distance, where he stops it and puts the note: "It is unknown in New Mexico under what name the Rio Napestle is known farther east in

Louisiana. Could it be identical with the Arkansas?" That guess was correct, but not so the next one, where he shows the stream (now called the Cimarron) rising east of Taos and the Mora flowing into it, but calls it "Rio Rojo de Natchitoches or Rio de Pecos," and where he stops it puts this note:

> It is believed in New Mexico that the river which rises northeast of the village of Taos, and which receives the Rio Mora, is the same which, farther east in Louisiana, is known by the name of the Red River. This last, mingling its waters with those of the Boeuf River and Black River, empties into the Mississippi below Fort Adams.

The same map shows the true Red River (which it calls Rio Rojo de Natchitoches, and Rivière Rouge, running southeastwardly in a continuation of the course of the supposed Red River after it receives the Rio Mora, beginning at about 36° north latitude, 103° west longitude, which is about a degree north and a few miles east of its actual source. The Canadian River, except that portion which is erroneously called the Red River of Natchitoches, does not appear on the map at all.

The French map makers of the eighteenth century, knowing less of the actual geography than did Humboldt, were much bolder in their assumptions, and without any qualifications or cautionary notes, they showed the Red River as rising in the Rocky Mountains, far to the northwest of its true source, while the Canadian, as already stated, they took no account of. Their ignorance of the Canadian shows conclusively that the written account of the discovery of that stream in 1740 was

hidden away in the French archives, and that all other record of the discovery soon perished with the few Frenchmen who knew or had heard of it. M. Pierre Margry's recent publication of original documents in regard to French explorations shows that the two brothers Mallet, who had gone to Santa Fé in 1739 by a more northern route, returned in 1740 by a stream which they expected would flow into either the Red River or the Arkansas, but which ultimately brought them to the point where the Canadian enters the Arkansas.[1] The

[1] The 8th of June they returned to the river's edge, which they followed to the 11th; the 15th, 16th, 17th, 18th, and 19th they stopped, and, having consulted carefully about the course which this river seemed to take, they resolved to abandon 18 horses which they had and to make canoes of elm bark to embark in. That was done, although they had only two knives among the four. They had then made 220 leagues by land from Santa Fé.

The 20th they embarked in two little canoes and made 10 leagues, this stream having but little current.

The 21st they made the same amount of distance. The 22d they saw two fine mouths of rivers, which might well be the Pecos and Mare rivers, which they had crossed near Santa Fé. Finally, the 24th, they were agreeably surprised to find themselves at the fork of the Arkansas River. They had then made 42 leagues by canoe. They found, below the fork, a cabin of Canadians, who were hunting for salt meat. As they only had their arms and some ammunition left, they went on a hunt with the others and loaded a dugout with salt provisions, with which they betook themselves to the fork of the Arkansas and from there to New Orleans. (Margry, Decouvertes Et Etablissements Des Francais Dans L'Amerique Septentrionale, part 6, page 161).

As printed in Margry, the first reference to the forks of the Arkansas in the above quotation reads "source," obviously a misprint for "Fourche," which occurs two lines below. The presence of Canadians just below the mouth of the then unnamed Canadian River suggests the most probable origin of the name it ultimately received.

stream which they followed down was the Canadian, and the next year André Fabry de la Bruyère tried to ascend it in boats in order to reach Santa Fé, but could not get beyond a point a little east of 98° 30′, as shown by Pike's chart, which puts the mouth of the Canadian much too far west. Fabry wintered there, but went no farther. He called the river the St. André.[1]

[1] The Sieur Fabry, having no more provisions on his arrival, had two oxen killed, one of which he had salted in order to go to the fork, not counting on getting game below them. He obtained with much trouble five dugouts from the savages, with which he left the 31st of October and went in 35 days to four leagues from the fork of the river of the Arkansas [Indians], whence [i. e., from whose village] to this place he counts only 145 leagues, instead of 200, as the hunters compute it. The frequent rains which had then fallen and the good intelligence of the Canadians and the soldiers making him hope to succeed readily, he continued on his route and entered on the 7th of December the left fork, which is the river which should go up as far as Santa Fé. He found there enough water up to the mouth of the two other streams, whose water it received 17 leagues above its mouth; but on the 13th the water failed above the last of these streams, which he named South River, and he was stopped there until the 21st, when a storm having made the water rise five feet in the river which leads to the Spaniards, and to which he gave the name of the River St. André, he advanced until the 25th, when the water again failed him. He could only continue his route on the 10th of January, 1742, and with much difficulty, having been obliged to drag the dugouts in some places.

The 15th he reached the entrance of a large bayou, above which there was not six inches of water in the river. He camped at this bayou to wait for the water there, having then made, by his calculation, 42 leagues from his entrance into the river St. André.

* * * * * *

The 29th [of February] they loaded the dugouts at the mouth of the bayou. It was necessary to get into the water and drag them, and they could only make a league and a quarter the whole day; the 1st of March a league and three-quarters in the same manner; the 2d, a third of a league, the cold being too great for them to stay in the water; the 3d, three-quarters of a league; the 4th, three-quarters of a

The brief account of the Mallets' trip, as well as Fabry's letters, were filed away, however, and the facts as to the Canadian remained unpublished, so they had not the least influence upon the persistently held theory, which soon developed into an undisputed geographic fact in the eyes of map makers, that what we know as the sources of the Canadian were the sources of the Red River. This is shown not merely by the statements on

league; the 5th, a league and three-quarters, it being necessary to unload and use levers to pass places where there was no water, and they encamped in a warm region. The 7th they did not advance, everyone being wearied with such laborious navigation.

Nevertheless, there was no other course to take than to procure horses. He proposed to them to go himself and seek them where he was sure of finding some; that to this end he would descend with dugouts, lightened, to the Arkansas, and that if he could not obtain any [horses] from that nation, where they are still rare, he would find at least some of the king's horses, which would serve him for carrying his goods as far as the Caddos, where he would find some cheap.

This plan having been approved, the sieur Fabry got ready for his departure with five men.

Having taken all the precautions which he judged necessary, he left on the 4th of April, but the water was so low that he could only drift a league in three hours and a half's time, dragging the dugouts the whole way, which forced him to return to the camp and wait until the water rose. On the 5th it rained, the first time since the 8th of February. The water increased a little in the night, and on the 6th it had increased three inches. He promptly embarked in another dugout to go to join the one he had left lower down. He divided the load between the two in order to drag them more easily, and at once departed. He spent six days in going as far as the fork, where he found the river so low that he was 12 days in descending it, having run aground in several places.

On the 26th he reached the Arkansas [Indians]. (Margry, Découvertes, etc., Part 6, pp. 473 to 485.)

Humboldt's map, but even more strongly by those on Pike's chart. On this latter map (U. S. Exhibit No. 2, *infra*), although Fabry's wintering ground of 1741–42 on the Canadian is shown, yet at a point on the Red River about the ninety-sixth meridian there appears the note, "The Acadians, returning from Sta. Fie in June, 1740, left their horses here, and descended the Red River in bark canoes." The fact was that these Acadians were the Mallet brothers, and the extract from their journal, as published by Margry, states that on June 20, 1740, four days before reaching the Arkansas, they abandoned their eighteen horses, and embarked in two bark canoes, which they had made during the five preceding days.[1] They then supposed that they were on a branch either of the Red or the Arkansas, and they ultimately found that they were on the as yet unnamed Canadian, but so strong was the belief that the Red River rose near Santa Fé and that the Canadian was a comparatively small stream, that although a tradition of the Mallets' return from Santa Fé was preserved, their route by the Canadian was forgotten, and it was asserted that they had returned by the Red River.

Maj. Amos Stoddard's Historical and Descriptive Sketches of Louisiana, published in 1812, and written during the eight years preceding, contains these statements:

> That country [Louisiana] is less known than any other (inhabited by a civilized people) of the same extent on the globe. While it was in the possession of France and Spain, at least till near the close of

[1] See note p. 65, *supra*.

> the American Revolution, it was almost inaccessible to us. * * * All the old maps are extremely defective. * * * No detailed accounts of the interior are to be found in the records of Louisiana literature. * * * Of the immense country between these low grounds and the rivers to the westward of them, and between the Washita and the Arkansas, no correct information was ever obtained. It was partly explored by the Frenchmen in the early part of the last century, but no record of their discoveries, at least of any merit, has been handed down to us. * * * It is certain that the French nearly a century ago penetrated the Arkansas to its source, but they have left us no accounts of the country in that quarter (pp. v, vi, vii, 203, 206).

Major Stoddard was the officer who took possession of upper Louisiana under the cession, in 1804, and he spent between five and six years on the Lower Mississippi and the Red River. It is therefore very significant when he states that no record of the French discoveries in the interior have been handed down. It is also significant that in his chapter on the rivers of Louisiana he does not mention the Canadian at all, and says in regard to the Red River:

> The main branch of this noble river has its source in the Mexican mountains to the eastward of Santa Fé, and in about north latitude 36° (p. 378).

This latitude is nearly that of the source of the Canadian, and Stoddard's various statements only serve to show how completely the record of the Mallets' discovery had been lost.

The strength of the idea that the sources of the Canadian were really the sources of the Red River is shown

by the fact that, of all the geographers who made maps of this region before 1821, Humboldt was the only one who did not consider the identity of the Spanish Rio Rojo, rising in the Rocky Mountains, with the Red River of Louisiana so certain as to warrant their being put down on a map as one continuous stream. That the geographers before Humboldt showed the Red River as flowing down from the Rocky Mountains, and omitted the Canadian, has been already seen; and those who followed him (Pike, Melish,[1] Darby, Pinkerton, and Arrowsmith, U. S. Exhibits 2, 3, 5, 6, 11, 12) did the same, except that they showed the Canadian, though always rising at or east of the one hundredth meridian. That it did not rise west of that line seems to have been as generally and as firmly believed in 1818 as the fact that the city of Washington was situated near the seventy-seventh meridian, or that Philadelphia was on the Delaware River.

Mistaken view of the court below as to early maps showing the Canadian.

The court below is of opinion, however, that the fact that the source of the Canadian lay some distance west of the one hundredth meridian was sufficiently indicated

[1] The court has pointed out (*United States* v. *Texas*, 162 U. S., 1, 29) that the one hundredth meridian, "astronomically located, is more than 100 miles farther west than is indicated by the Melish map." This fact is immaterial in the present connection, as the Melish map certainly shows what was believed at the date of its publication. Were this error allowed for, the only result would be to show the Canadian as rising "more than 100 miles" *east* of the one hundredth meridian.

by certain maps made prior to 1818, and which were relied upon in the boundary negotiations between the United States and Spain. The opinion says:

> While it may be true that no map published prior to 1820 delineated the Canadian River, by that name, with its source west of the one hundredth meridian, yet there were maps in existence which did in fact delineate the stream subsequently known as the Canadian, with its source west of the one hundredth meridian. (Map of De l'Isle, De l'Isle's Atlas Novean, vol. 1, No. 5; vol. 2, No. 28; Boehme's map, published at Amsterdam in 1746; American Maps, vol. 1, No. 18.)
>
> During the period commencing in 1805 and ending in 1821 there are evidences that some of these maps were used by the United States in the negotiations with Spain, at different times, preceding the treaty with that country which resulted in an exchange of the land between the Canadian and Red rivers, west of the one hundredth meridian, for Florida, then owned by Spain.
>
> Among the proofs of the title of the United States to all the land between the Mississippi and the Rio Grande del Norte, watered by rivers flowing into the Gulf of Mexico or the river Mississippi, are the maps last mentioned. They were used by Secretary Madison, by Ministers Monroe and Pinckney, by Secretary Monroe, and by Secretary Adams, and as later geographical explorations gave to the world the absolute information that the true source of the Canadian was on the meridian at 104° 30′ west longitude, we think the evidence sufficiently clear to conclude that the possessions of the United States covered the territory ceded to the Choctaw Nation by the treaty of 1820. (Rec., 392.)

It is submitted, in the first place, that these maps could not have been among those made use of by the statesmen concerned in the negotiations with Spain; and secondly, that they do not show any stream which could possibly have been understood as the Canadian River.

All three of these maps, tracings of portions of which appear in the record (Clmts.' Exhibs., Nos. 29, 34, 35, opp. pages 82, 84, 85), have been reproduced under the order of this court, and the reproductions are annexed to this brief. They are on a very small scale. The first De l'Isle map is one of the Western Hemisphere, published in 1720; the second De l'Isle map is of North and South America, published in 1739; while Boehme's map (which is No. 18 in volume 1 of the collection of American maps in the Library of Congress) is little more than a duplication of the latter. These maps may have served well enough to indicate in the most general way the geography of the American continent as a whole; but none of them would have been used in a primary school to teach the geography of the Louisiana cession, as they are entirely too small for such a purpose, to say nothing of negotiations in regard to an international boundary. Had the maps in De l'Isle's Atlas Nouveau been used at all in the negotiations with Spain, no attention would have been paid to such rudimentary maps as the two mentioned by the court below, but only the large maps would have been regarded, such as Nos. 38 and 39 in volume 2 (especially the former), which were put in evidence by the attorney for the Chickasaws, by partial tracings (Clmts.' Exhibs., Nos. 28 and 30, opp.

rec. 82 and 83), and both of which have been reproduced under the order of the court.

Not one of the three maps named by the court below is mentioned in the American State Papers in connection with the negotiations with Spain. Boehme's map is not among the lists either of Spanish or of American authorities (Am. State Papers, For. Relns., Vol. IV, 471, 482), while the "De l'Isle's map," referred to in those lists as a "geographical authority" in support of the claim of the United States was, of course, the one mentioned in the letter of Messrs. Pinckney and Monroe to Don Pedro Cevallos, April 20, 1805, where reference is made to maps of *Louisiana*, including "that of De l'Isle, of the Royal Academy of Sciences at Paris, which was revised and republished in 1782." (Am. State Papers, For. Relns., Vol. II, p. 664.)

De l'Isle's map of Louisiana of 1782 is well known, and a reproduction has been annexed to this brief for the convenience of the court. Its title is, "Carte de la Louisiane et du Cours du Mississipi," and it is substantially the same—precisely the same so far as concerns the Arkansas River—as the map of 1741, which is No. 38 of volume 2 of De l'Isle's Atlas Nouveau. It shows the Arkansas rising at about longitude 275° 45′ east of Ferro, or 101° 45′ west of Greenwich, and flowing southeast, without any tributaries whatever on its southwestern side.

Moreover, the three maps mentioned by the court below do *not* "delineate the stream subsequently known as the Canadian, with its source west of the one hundredth meridian." Both of the De l'Isle maps show the

main Arkansas River, and a branch of about the same length as the main stream uniting with it some distance down. In the Western Hemisphere map the river is unnamed, but in the Map of America the name "R. des Acansa" is given to the *southern* stream, identifying it as the main stream, and the other as a branch coming in from the northwest, either the Verdigris or the Neosho, and evidently believed to be as long as the main stream. Had the Western Hemisphere map been on a scale that made it worth while to identify the Arkansas by a name, certainly this name would have been affixed to the southern stream, as in the slightly larger Map of America. The Boehme map does not name either branch, nor any part of the Arkansas. It is evidently based upon these De l'Isle maps, and in fact is little more than a duplication of them, calling for no separate notice.

What these maps show is simply a conventional representation of a general idea that the lower Arkansas—the only portion of the stream that had actually been explored when these maps of De l'Isle were made—was formed by the confluence of two branches (and in point of fact it is formed by the confluence of several), an idea probably due to some information given by La Harpe, who, in 1719, was on what he called "the southwestern branch of the river of the Alcansas" (Rec., 155), though he reached it by marching across country and not by ascending it. He said he was told by the Indians that the river came down from the villages of the Spaniards and the Padoucas, uniting below the village where he then was; but La Harpe did not visit the point where the streams

join, nor is it at all certain whether he was on the Canadian, the Cimarron, or the Arkansas itself. The confluence of the Canadian with the Arkansas was first discovered by the Mallet brothers in 1740, but, as already stated, the records, both of their journey and of Fabry's attempt to ascend the Canadian, were buried in the French archives and had no influence on the maps at all, whatever tradition of their journey survived being to the effect that they came down the Red River, as shown by the note on Pike's map.

It is submitted that one has only to look at the larger maps of De l'Isle, to say nothing of other geographers, to realize that what appears on his small-scale maps was not intended to delineate the Canadian at all, that stream being unknown to him. Had he known of it, he would of course have put it in his large-scale maps.

The very palpable mistake of the learned judge of the court below in regard to what the three maps named by him show, was probably due to his not looking at the maps themselves, but at the incorrect tracings of small portions of them, which were filed by the attorney for the Chickasaws. The tracing (clmts.' exh. No. 29, opp. Rec., 82) from the map of the Western Hemisphere (No. 5 in vol. 1 of De l'Isle's Atlas Nouveau) gives the name R. des Acansas to a northern confluent of what is of course intended for the Arkansas River, but in the original map both this confluent and the main stream are nameless. The same tracing shows the confluent as much longer than the main stream, which the original map does not do. The words "main stream" and "confluent" are

here used advisedly, not merely because De l'Isle's larger maps show no tributaries of the Arkansas on its southwestern side, but also the map of America (No. 28 in vol. 2 of De l'Isle's Atlas Nouveau), which is on nearly the same scale as the Western Hemisphere map, gives the name "R. des Acansa" to the southern stream, showing that that was the main stream, and the northern stream one of its numerous northern branches. By inserting the words "R. des Acansas" on the tracing of the map of the Western Hemisphere in a place where they do not belong, and by omitting them from the tracing of the map of America (elmts.' exhib. No. 34, opp. Rec. 84), the attorney for the Chickasaws succeeded in completely perverting the testimony of De l'Isle's maps, making them show precisely the contrary of what they did show, and apparently misleading the court below.[1]

The Quapaws had no land west of the one hundredth meridian.

Not only does the treaty map, when understood, as it was clearly intended to be, with reference to the longitude shown on Pike's chart, conform to the best geographic

[1] These remarks must not be understood as casting any reflection upon the *bona fides* with which these tracings were made. The errors were, of course, purely accidental, and the tracings were made with reference to the question of the disputed western boundary of Louisiana, and before the counsel for the United States called attention to the fact that the Canadian River was not shown on any map before Pike's. Had the attorney for the Chickasaws had any idea when he made these tracings that the delineation of the Arkansas and its branches had any bearing on the case, he would presumably have taken especial pains to be accurate in regard to them.

knowledge of its day in representing the Canadian as rising at or just east of the one hundredth meridian, but in point of fact the Quapaws had no claim to any land west of that meridian. Of course they knew nothing of meridians, but as a matter of fact their hunting grounds, according to their utmost claim, did not extend farther west than the actual country which lies in what geographers call the one hundredth degree of west longitude.

The Quapaw tribe was usually called by the French the Akansa, though with many variations of spelling, that being the name used by the Illinois, and the spelling of it has taken final form as Arkansas. As the villages of this tribe were near the mouth of the Arkansas, the first Frenchmen who descended the Mississippi, meeting these Indians, called the river where they dwelt the rivière des Akansas. Joutel, who returned to Canada with some of La Salle's followers after the latter's death, reached their villages on July 24, 1687, and reported their warriors at about 700.

> The villages of the nation were called: The first, Otsoté; the second, Thoriman; the third, Tonguinga, and the fourth, Cappa, of which we have already spoken. Although this nation is called Akansa in general, not one of the said villages bears the name. The two first are situated on the river called that of the Akansas, and the two others on the river Colbert [Mississippi], one on one bank and the other on the other.

After mentioning the three villages in succession, he wrote:

> The 30th, we left the said village to go to that of the Kappa, which was the last of this nation, and

> which they told us was 8 leagues off. * * * According to what I could learn 400 warriors would go out of [i. e., go on the war path from] this village and fully 300 from the others. (III Margry, 444, 458, 462; Rec., 146, 147.)

La Harpe, who visited the Arkansas in 1722, mentions the Ougapa village on the Mississippi (Rec., 158), and Le Page du Pratz, whose book was published in 1758, refers to the Kappas as having retired among the Arkansas, residing on the river of that name, 4 leagues from its mouth. (Rec., 226.)

Sibley, writing in 1805, said:

> ARKANSAS. Live on the Arkansas River, south side, in three villages, about twelve miles above the post or station. The name of the first village is Tawanima; second, Ousolu; and the third, Ocapa; in all, it is believed, they do not at present exceed one hundred men, and diminishing. They are at war with the Osages, but friends with all other people, white and red; are the original proprietors of the country on that river, to all which they claim, for about 300 miles above them to the junction of the river Cadron with Arkansas. Above this fork the Osages claim; their language is Osage. (Am. State Papers, Ind. Affrs., Vol. I, p. 725.)

As Cadron Creek (a small stream entering the Arkansas from the north about 25 miles above Little Rock) is much less than 300 miles above the site of the Quapaw villages (one of which was close to what is now Little Rock), and could not properly be described as a "river," or a "fork" of the Arkansas, it is very probable that Sibley confused this stream with the Canadian, to which his language would be more appropriate. It is true that on

the *north* side of the Arkansas the Cadron, or Quadrant, was recognized as the Quapaw boundary (see treaty map *infra*, and Paul's map of 1816, Rec., 159), and this fact probably caused Sibley's error.

While the Quapaws were certainly less numerous than in Joutel's time, Sibley's estimate of their population was too low; as Clark reported them in 1816 as 1,060 souls, including 340 men. (Rec., 244.) He stated that they lived in four villages, which indicates that Sibley, who only mentions three, was unaware of the fourth village, and omitted its inhabitants from his estimate.

Chouteau's report of February, 1816, contains this statement:

> The country of the Arkansas was bounded as follows: Beginning on the Mississippi at the *Ile aux Chicots*, thence to the Quadrant (on Arkansas River), thence with the line of the Grand Ozages to White River, thence to the mouth of the St. Francis, thence across the Mississippi thirty miles, and including that distance on the east side thereof to a point opposite the beginning. (Rec., 166.)

Long's report of January 30, 1818, referred to the Quapaws as follows:

> The Quawpaws, a small tribe residing on the south of the Arkansaw, between 100 and 150 miles above its confluence with the Mississippi, at present able to furnish no more than sixty or seventy warriors, next laid claim to a portion of the country, which they have enlarged from time to time at the instigation of the French and other whites, who have resided and intermarried with them, till at length they pretend to claim all the country under consideration. The Quawpaws are a branch of the Osage

> Nation, as is plainly evinced by the similitude of their language, shape, and features to those of the Osages, and claim the country under the same tenure, the right of conquest and possession. The original claim was limited as follows:
>
> Beginning at the lower end of the village or post of Arkansaw, on the south of the river, and running up the river on the same side to Michael Bon's settlement, thence southwardly in the nearest direction to the main fork of the Saline of the Washitan, thence down said fork, Saline, and Washitan, to a point nearest to the place of beginning, and thence northwardly to the place of beginning, including a tract about forty miles in width and fifty in length. (Rec., 169.)

Judged by Clark's report of November, 1816, Long seems to have considerably underestimated the number of the Quapaws, and Clark was certainly the more competent authority of the two. Chouteau's ideas of the limited extent of the Quapaw country seem to have been modified two years later, when Clark and he negotiated the treaty with them, and reported as follows:

> It will be seen that a large tract of valuable country (which at all times heretofore has been considered their [i. e., the Quapaws'] property, as well by former governments as by the Osages, their neighbors) has been ceded to the United States. (Am. State Papers, Ind. Affs., Vol. II, p. 177.)

This report shows that Clark and Chouteau understood the Quapaw hunting grounds to have extended very considerably west of the small district immediately surrounding their villages, and their report necessarily carries great weight. It is probable that the Quapaws

could, with some justice, claim about as far west as the one hundreth meridian, where the source of the Canadian was then believed to be, but beyond this they certainly could not claim. Whether or not the Quapaws could really claim anything west of the Cross Timbers, which would seem to be a natural boundary between them and the Indians of the Western prairies, is a purely speculative question. The treaty says nothing about the Cross Timbers, and undertakes to limit the cession on the west by a line not yet surveyed, a purely artificial boundary. Whether or not the Quapaws ever ventured as far west as where a surveyor would have marked that line, it is certain that beyond it, as Humboldt's carefully drawn map shows, was the acknowledged hunting ground of the Comanches, Kiowas, Apaches, Lipans, and other hereditary foes of the Indians of the Lower Arkansas. Sibley's report of 1805 gives some idea of the extent of the Comanche country, where he says: "They alternately occupy the immense space of country from the Trinity and Braces, crossing the Red River, to the heads of Arkansas and Missouri, to river Grande and beyond it, about Santa Fé, and over the dividing ridge on [to?] the waters of the Western Ocean." (Am. State Papers, Ind. Affs., Vol. I, p. 723.) The reference to "the Western Ocean" is an exaggeration, but there is no doubt that the Comanches roamed over the eastern part of the region mentioned by Sibley, probably as far east as the Cross Timbers. The true boundary between them and the Quapaws is uncertain, but it could not have been west of the one hundreth meridian.

The proper interpretation of the Quapaw treaty.

It is true that "course and distance yield to natural and ascertained objects" (*Preston's Heirs* v. *Bowman*, 6 Wheat., 580), and that "the most material and most certain calls shall control those which are less material and less certain" (*Newsom* v. *Pryor*, 7 id., 7), as stated by the court below, but it is not enough that an object should be "natural" in order that it should control. It must also be "ascertained," i. e., known. In 1818 the source of the Canadian Fork was really unknown, unascertained, and hence any reference to it must be controlled by that belief of the parties which took the place of actual knowledge. That belief gave this call for the source of the Canadian the only certainty which it possessed at that day. It was believed to be near the one hundredth meridian, where the standard maps of the day placed it. Interpreting the treaty of 1818 by the knowledge and belief of the parties, therefore, it is clear that the intention was to cede the country bounded by the Canadian to about the one hundredth meridian, the boundary line running southward on or near that meridian to the Red River.

Where the intention of the parties to a deed is clear, but there are mistakes of description, owing to a misconception of the position of natural objects, the intention of the parties will be made to prevail. Thus in *Croghan* v. *Nelson* (3 How., 187) the clear intention to enter 1,000 acres of land was upheld, although this involved a change in some of the calls.

Where a deed names a boundary line which is supposed by the parties to have a certain location, but which is really located elsewhere, it has repeatedly been held

that the intention must control the meaning of the words of the deed. In one such case it was said:

> When the true line has long been doubtful, and conveyances have been made bounding on the *reputed or supposed line*, or line of actual holding and possession, and such reputed or supposed line is capable of being shown by proof, such conveyances will have their full effect in passing the land up to such supposed line, though a different line be afterwards fixed by the legislature as the true line by a declaratory act. (*Cook* v. *Babcock*, 7 Cush., 526.)

In another case, Gray, J., said:

> In the case at bar the jury were therefore rightly instructed that although the presumption upon the face of the deeds would be that they conveyed to the true record line, yet that line was not necessarily the boundary between these parties, but if a different line was shown to exist, adopted by the towns and their inhabitants, and considered universally (which would include the parties to the deeds) to be the Shirley and Lunenburg line, that would be the boundary referred to in the conveyances. (*Putnam* v. *Bond*, 100 Mass., 58.)

Similarly it has been held in New Hampshire:

> If "Derry old line," as located, had been shown, as the plaintiffs contended the fact to be, not to have been the true original line of Londonderry, then it was competent for the jury to consider and find, from the evidence before them, what line was understood and intended by the parties to the deed to be designated by that expression; and if they found it to be a certain located line, marked by monuments, other than the true original line of Londonderry, but known as "Derry old line," the intention of the parties should govern. (*Hall* v. *Davis*, 36 N. H., 569.)

The rule that monuments, whether natural or artificial, must control in boundaries is far from being inflexible. A boundary inadvertently inserted, or contravening all other terms of the description, or defeating the evident intention of the parties, may be rejected, even though it may be identified by a natural monument. Thus in *Parks* v. *Loomis* (6 Gray, 467) a boundary by a named stream was rejected on the ground that "its description is impossible and the lines can not be made to meet," and a boundary line was required to be run at a considerable distance from the stream, it being evident that the stream had been referred to through ignorance or inadvertence. So in *Murdock* v. *Chapman* (9 Gray, 156) a description by course and distance was disregarded because it excluded a lot shown on a plan and mentioned in the deed as being conveyed. It was held that the plan and reference in the deed showed the plain intent of the parties, and that the actual description in the deed would have to yield to this. (To the same effect are *Davis* v. *Rainsford*, 17 Mass., 207; *Thatcher* v. *Howland*, 2 Met. Mass., 241; *Bosworth* v. *Sturtevant*, 2 Cush., 392.)

In the present case the supposed source of the Canadian was not, indeed, "marked by monuments," but it was the subject of a very definite, though incorrect, understanding on the part of geographers and explorers, and also of the community generally, as far as the matter had received the attention of the public. It is immaterial that the true intent and meaning of the parties was based on an error. The important matter is to know what that true intent and meaning was, and it

seems clear that it was to bound the cession by a line drawn due south from where they believed the source of the Canadian to be, to the Red River, such line being, accordingly, either on or just east of the one hundredth meridian.

This construction of the cession by the intent and meaning of the parties does not at all conflict with the view taken by this court in *United States* v. *Texas* (162 U. S., 1, 37) in construing the Spanish treaty of 1819, that where the map referred to in the treaty was in error as to the position of the meridian which was to form the boundary, the true meridian must have been intended and not the meridian as shown on the map. The error in Melish's map as to the one hundredth meridian was of a different kind from the error as to the source of the Canadian. The error as to the meridian could make practically no difference as to the quantity of territory on either side of the meridian line, because, whether the map were right or wrong, each party could, and very probably did, calculate with at least reasonable accuracy the area of the district which was now conceded to belong to it under the treaty, as distinguished from that of the district which it had formerly claimed. The distance between any point known by latitude and longitude and any meridian in any latitude is a matter of mathematical calculation, and the fact that a map may show a meridian too far east can not affect the calculation. Such an error in a treaty may mislead the parties as to the geography of the region through which the meridian passes, but it can not mislead them as to the extent of the territory on either side of the meridian. Where, however, as in the

case of the Quapaw treaty, the boundary is not placed at a fixed meridian, but at a line running south from a natural object, and that natural object is misplaced on the map, the error would mislead the parties in any calculation they might make as to the area of the territory so bounded, because that calculation would have to be based on the map. The decision in *United States* v. *Texas* carried out the intention of the parties to the Spanish treaty of 1819, because it placed the boundary at a point which would give each party the amount of territory which it understood that it was to have; but in the present case to construe the Quapaw treaty of 1818 as calling for a line south from the true source of the Canadian to the Red River would not carry out the intention of the parties, not only because no such line could be drawn, but because the line most nearly approximating thereto would make the cession contain a very much larger area than was intended. Hence the doctrine underlying the decision in *United States* v. *Texas*, the doctrine of carrying out the intention of the parties, requires that in the present case the source of the Canadian should be understood as meaning the point where the parties to the Quapaw treaty understood that source to be, and not the actual source.

Mistake of the court below as to the Quapaw treaty.

The opinion of the court below says little in regard to the Quapaw cession, but enough to show that the majority of the court held that it extended west of the one hundredth meridian. The opinion says:

> There is no proof that in the negotiation or in the ratification of the Quapaw treaty either the Quapaws

> or the United States used any maps at all or considered the question of longitude. * * * Upon the question of intention we think it more probable that the Government originally intended to acquire from the Quapaws * * * all the territory west of the one hundredth meridian to the dominions of Spain. (Rec., 393–395.)

That the Quapaws knew little of maps and did not consider the question of longitude is probably true, but there is convincing proof of the use of maps in connection with the making of the treaty. As already stated, a carefully drawn map of the cession and adjoining country appears on the very first page of the treaty, and is referred to in the text of the treaty itself. (Art. 2, 7 Stats., 176.) The map is in fact a part of the treaty. It is true that it has no lines to show latitude or longitude, but it closely follows Pike's chart, which does show them, and it is morally certain that the commissioners who executed the treaty, and probably also the Secretary of War and the Senate committee who reported it favorably, compared it with that chart and took note of the longitude.

The opinion holds it to be "more probable that the Government originally intended to acquire from the Quapaws * * * all the territory west of the one hundredth meridian to the dominions of Spain." Why "to the dominions of Spain?" The treaty says nothing about those dominions, the boundary of which was in dispute, but refers to the source of the Canadian, and to a line drawn south from that source to the Red River, which was manifestly believed to rise farther west than the Canadian. It is much more probable that the Government originally intended to acquire from the Quapaws

the country between the Canadian and Red rivers, up to a line drawn south from where the source of the Canadian was then believed to be, to the Red River, than that it intended to acquire the country as far west as an undefined and disputed boundary not mentioned in the treaty at all. The claim made by some persons in authority at that time was that the Rocky Mountains or the Rio Grande constituted the proper boundary, but no one had ever hinted that the source of the Canadian, and a line drawn thence southward to the Red River, had anything to do with the boundary of the Spanish dominions. The fact that the compromise line subsequently adopted, i. e., the one hundredth meridian, did pass where the source of the Canadian was believed to be, or just west of it, was a mere matter of coincidence. To speak of the Quapaw cession as intended to run westward to the dominions of Spain is to utterly disregard the terms of the Quapaw treaty.

(2.)

The cession to the Choctaws in 1820 did not extend west of the one hundredth meridian. (See Third assignment of error.)

To show, as has been done above, what was the western boundary of the Quapaw cession of 1818, is the first step toward refuting the theory of the court below as to the western boundary of the cession to the Choctaws in 1820. The next step is to show that what passed by the latter cession was simply the western portion of what had been acquired by the former one, and that the understanding and intention of the parties to the treaty of 1820 were, as regards the western boundary, the same as those of the parties to the treaty of 1818.

The treaty commissioners in 1820 believed the Canadian to rise at the one hundredth meridian.

For more than two years after the Quapaw treaty of 1818 no new map of this region appeared, Melish's map of the United States, edition of 1820, being, as to this region, identical with the map of 1818. The American Universal Geography, by Jedidiah Morse (seventh edition, Boston, 1819) does not mention the Canadian at all, nor show it on its map, but refers to the Arkansas and Red rivers as follows:

> *Arkansaw River*, after the Missouri, is the longest, and in some seasons the largest, branch of the Mississippi. It rises near the 41st degree of N. lat. and 110th of W. lon., among the same mountains which give rise to the Platte and Yellow Stone branches of the Missouri; to the Colorado, of California, and to the Rio del Norte. Its general course is S. E., and it empties into the Mississippi in lat. 34 N. and lon. 91 W., having traversed 7° of lat. and 19 of lon., upwards of 1,100 miles in a direct course, or nearly 2,000 following the windings of the stream. The Arkansaw greatly exceeds in length either the Ohio or the Mississippi proper. That part of the river which runs within the Arkansas territory is skirted in great part by extensive prairies and has much alluvial land. The navigation of the river is impeded by a considerable number of rapids. (Vol. I, p. 656.)
>
> *Red River* falls into the Mississippi in lat. 31° 5′ N., lon. 91° 47′ W., 1,068 miles below the Missouri. It rises in Mexico, and is there, according to Humboldt, believed to be the same with the Rio de Pecos, which rises near lat. 38° N. and lon. 104° W., a little

northeast of the village of Taos. Its length on this supposition is upwards of 1,200 miles (p. 669).

As Morse's book was undoubtedly an authority in its day, this identification of the source of the Canadian as that of the Red River, coupled with the omission of all mention of the Canadian as a branch of the Arkansas, is very significant. In this state of geographic knowledge the Secretary of War, on July 12, 1820, sent to Generals Jackson and Hinds their commissions to treat with the Choctaws, instructing them to offer the Choctaws "*a portion of the Quapaw cession* in the Arkansas Territory, the boundaries of which, copied from the treaty, are inclosed." (Am. State Papers, Ind. Affs., Vol. II, p. 231.) These instructions not merely explain how the language of the grant to the Choctaws came to follow so closely that of the cession by the Quapaws, but they show conclusively the intention of the United States in regard to the land to be ceded. Whatever district, great or small, was to be ceded to the Choctaws, it was to be within the limits of the Quapaw cession, and could not lie outside those limits. When, therefore, the commissioners drafted and executed a treaty, using the words "up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River," and reported to the Secretary of War that they had done so (Am. State Papers, Ind. Affs., Vol. II, p. 241), they meant that the treaty was to grant to the Choctaws the western portion of the Quapaw cession as that cession was understood with reference to the maps of the day, i. e., that it was to run to, or very nearly to, the one hundredth

meridian. Their report refers specifically to the map as the means of ascertaining the extent of the cession. They say:

> From an examination of the map you will find that Little River is about 60 miles above the Great Raft on Red River, and that we have located the Choctaws as high up the same as practicable.

It is immaterial whether "the map" meant any particular map or not, for all maps of the day that showed the Canadian at all were based on Pike's chart, which placed its source at the one hundredth meridian or just east of it, from which supposed source it appeared easy to draw a line due south to the Red River. In point of fact it is practically certain that Pike's chart was the map referred to, its scale rendering it the standard for that particular region (see Long's mention of it as his "only guide," Rec., 266), just as Melish's map was the standard map of the United States taken as a whole. The words "as high up the same [i. e., the Red River] as practicable" were, of course, used with reference to the authority of the commissioners, and meant "as high up the Red River as the extent of the Quapaw cession permits."

The President, the Secretary of War, and the Senate had the same understanding.

There can not be a shadow of doubt that the Secretary of War understood the instructions to the commissioners as authorizing them to cede land up to about the one hundredth meridian, but not beyond it; that the commissioners so understood the instructions, and that both

commissioners and Indians understood the cession as not going beyond that line. The treaty, executed with this understanding on October 18, 1820, reached the War Department in December, 1820 (the exact date not being shown on the Department records; see Rec., 266), and was transmitted by the Secretary to the President without comment December 12, 1820. (Rec., 269.) The President sent it to the Senate without comment on December 14, and that body referred it to a committee, received it back from the committee without amendment on December 19, and ratified it on December 21. (3 Sen. Ex. Jour., 227, 229, 230.) It was proclaimed January 8, 1821. There is no evidence whatever that any question was ever raised prior to the proclamation of the treaty by any of the persons who had to do with it, as to the position of the source of the Canadian being anywhere else than as understood when the Quapaw treaty was made, and as shown on all the standard maps of the day.

That the President and the Senate understood the treaty at the time of its ratification and proclamation precisely as the commissioners and the Indians had understood it at the time of its execution, i. e., as ceding land up to about the one hundredth meridian, but not west of it, is certain, for the following reasons:

First. No map existed until some time afterwards that showed the source of the Canadian west of the one hundredth meridian.

Second. The words "up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River," are perfectly intelligible with reference

to the maps of 1820, but express a geographic impossibility when construed with reference to our present geographic knowledge.

Third. After a protracted period of negotiation an agreement had at last been reached with the Spanish minister in regard to the cession of East and West Florida, and also the long-standing claims of the United States and its citizens against Spain, the Spanish claims against the United States, and the western boundary of Louisiana. A treaty covering all these matters had been made on February 22, 1819, and ratified by the United States, and it only required the ratification of the King of Spain. The time fixed for the exchange of ratifications expired August 22, 1819; but President Monroe was willing to waive the delay of the Spanish, as was ultimately done by the Senate in passing a second resolution of ratification in February, 1821. The boundary established by this treaty followed the Red River from a certain point westward to the one hundredth meridian, and ran thence due north to the Arkansas, thus making a fair compromise between the respective pretensions of Spain and of the United States.

It may be assumed as indisputable that while this treaty was awaiting the Spanish ratification the Administration regarded this boundary as established, at least as far as concerned its own dealings with the region affected by the treaty. The boundary must have been taken into consideration when Generals Jackson and Hinds were instructed to offer the Choctaws a portion of the Quapaw cession. Had any part of that cession been

understood to lie outside the boundary fixed by the Spanish treaty, it can not be doubted for a moment that the instructions would have explicitly excluded such part from the district which the commissioners were authorized to offer. The presumption of common sanity, not to speak of that of the correctness of official action, forbids the idea that the Administration, which had successfully negotiated the Spanish treaty in the face of many difficulties, and which was using all the means in its power to secure the ultimate establishment of that treaty, could have intended to disregard it in the negotiations with the Choctaws. As it was, however, the map upon which the description of the boundary in the Spanish treaty was based, Melish's map of 1818, as well as all other American maps, showed the source of the Canadian as lying just east of the one hundredth meridian, or, in other words, just within the boundaries established by the Spanish treaty. Certain English maps showed the source of the Canadian as still farther within that boundary, but of course only the American maps would be relied upon by the American Government in such a matter; and at all events every map showed the Canadian as wholly within the treaty limits of the United States. This condition of the maps fully accounts for the fact that the instructions to Generals Jackson and Hinds made no reference to the boundary of the United States established by the Spanish treaty.

Erroneous view of the court below as to the Spanish treaty.

The court below, however, holds that the United States had, in 1820, a title to land west of the one hundredth

meridian capable of being conveyed to the Choctaws; that the United States did, in the Choctaw treaty of 1820, undertake to grant a large tract of land west of the one hundredth meridian, and that it *subsequently* sold this tract to Spain as the price of the acquisition of Florida.[1]

It is submitted that this view of the court below, especially as to the two latter points, is wholly untenable. It is immaterial whether the claims of France to the boundary of the Rio Grande and the mountains (claims which the United States seems to have assumed along with the sovereignty of Louisiana) were well founded or not. The important point is that these claims were disputed, and that they were ultimately surrendered, though not in exchange for Florida, as the court below supposes, but in exchange for an undisputed title to the country between the Mississippi and the agreed boundary. The court below has wholly overlooked both the fact that if the United States claimed the country south and west of the Red River and the one hundredth meridian, as far as the Rio Grande and the mountains, Spain, with at least equal persistence, and possibly equal justice, claimed all the country south and west of the Bayou Atchafalaya, the Mississippi, and the

[1] Observe the following language in the opinion of the court: "When the United States actually sold the western part of the province of Louisiana, including all the land west of the one hundredth meridian, to the Spanish King, the treaty with the Choctaws had been closed. * * * Taking the proof altogether, we do not think it was the intention to place the western boundary [of the cession to the Choctaws] at the one hundredth meridian, * * * the intention of our Government in ceding land to them, which at that time we were trying to sell to Spain in exchange for Florida." (Rec., 392–395.)

Missouri, and the further fact that the price of Florida was the relinquishment of the American claims against Spain, and not the grant of any American territory.

By the Spanish treaty the United States relinquished disputed claims, but no territory.

The errors of the court below in this matter of history can be readily seen by referring to the American State Papers. In his message of December 6, 1805, President Jefferson stated that he had endeavored to come to an understanding with Spain as to the boundaries of Louisiana, but that he had so far procured from the Spanish Government only "a declaration that we had no rights eastward of the Iberville, and that our line to the west was one which would have left us but a string of land on the bank of the river Mississippi." (Am. State Papers, For. Rels., Vol. II, p. 613.) On March 19, 1806, he further stated:

> Unwilling to take any measure which might preclude a peaceable accommodation of differences, the officers of the United States were ordered to confine themselves within the country on this side of the Sabine River, which, by delivery of its principal post, Natchitoches, was understood to have been itself delivered up by Spain; and, at the same time, to permit no adverse post to be taken nor armed men to remain within it. In consequence of these orders, the commanding officer at Natchitoches, learning that a party of Spanish troops had crossed the Sabine River and were posting themselves on this side the Adies, sent a detachment of his force to require them to withdraw to the other side of the Sabine, which they accordingly did. (Ibid., p. 798.)

Napoleon's overthrow of the Spanish Government interrupted for several years all negotiations between the United States and Spain in regard to the various matters in dispute, but in December, 1815, negotiations were renewed. On January 19, 1816, Secretary Monroe wrote the Spanish minister as follows:

> It is known to your Government that the United States claim by cession, at a fair equivalent, the province of Louisiana as it was held by France prior to the treaty of 1763, extending from the river Perdido, on the eastern side of the Mississippi, to the Bravo or Grande, on the western. To the whole territory within those limits the United States consider their right established by well-known facts and the fair interpretation of treaties. In a like spirit may the United States demand the surrender of all the territory above described, now in the occupancy of Spain, as a condition to the commencement of any negotiation for the adjustment of differences. (Am. State Papers, For. Rel., Vol. IV, p. 425.)

The Chevalier de Onis stated in reply, February 22, 1816, that—

> The country to which you allude, extending to the Rio Bravo, or Del Norte, has been under the dominion of Spain, not only before and since France ceded Louisiana to His Majesty by the treaty of 1764, but from the time of the discovery and conquest of Mexico, without ever having passed by treaty to any other nation. (Ibid., p. 427.)

On June 10, 1816, Mr. Monroe repeated his claim (ibid., p. 430), but at a subsequent conference De Onis declared that he would not accede to an arrangement by

which Spain should cede her pretensions to the territory east of the Mississippi, if the United States did not relinquish theirs to the west of that river. Mr. Monroe appears to have offered to Spain the district between the Colorado and the Rio del Norte in exchange for Florida, but De Onis replied:

> As not only these lands, but all those which lie between the Colorado and Cape North, drawing a line by the river Mermento or Mermentao toward the Presidio of Adais, and from thence by the Arroyo Onda toward Natchitoches, are a part of the Province of Texas, belonging to and in the uninterrupted possession of His Majesty, without there having been in relation thereto any dispute between France and Spain (that dispute being solely as to Natchitoches, which fort the French raised unjustly in the territory of His Catholic Majesty), it results that this proposition not only does not offer compensation to His Majesty for West and East Florida, whose cession the United States intimate would be very agreeable to them, but it involves the relinquishment of the property and possession which His Majesty has of the territory in the Province of Texas which lies between the Colorado and the vicinity of Natchitoches. (Ibid., p. 438.)

The views of the two Governments in regard to this matter of boundary were so far apart that De Onis considered that any adjustment of the dispute would necessitate greater powers than he then possessed. Toward the close of 1817 these powers were given him and negotiations were renewed. On December 29, 1817, he wrote:

> The King, my master, being disposed to oblige the United States in whatever might be compatible

with the rights and honor of the Monarchy, and the dignity becoming his august character, would condescend to cede the two Floridas to this Republic in consideration of an exchange or equivalent which might be useful or convenient to Spain. But as this exchange or equivalent must consist of a territory belonging to the United States and which may offer invariable points, marked by nature, to fix the divisional line between the possessions of the Union and those of the crown of Spain in a manner never to admit of doubt or controversy hereafter, His Catholic Majesty caused certain proposals for the said exchange or equivalent to be made through his principal secretary of state to the minister of the United States at Madrid. * * *

You can not, therefore, but agree with me, sir, that it is absolutely necessary we should first settle the principal points relative to the question of boundaries before we proceed to form and offer proposals for the cession of the Floridas, and for an equivalent to their value or estimation, or for the general and definite settlement of all pending differences. (Vol. IV, p. 452.)

Mr. Adams's reply of January 16, 1818, included the following statement:

I am instructed by the President to propose to you an adjustment of all the differences between the two countries by an arrangement on the following terms:

1. Spain to cede all her claims to territory eastward of the Mississippi.

2. The Colorado, from its mouth to its source, and from thence to the northern limits of Louisiana, to be the western boundary; or, to leave that boundary unsettled for future arrangement.

3. The claims of indemnity for spoliations, whether

Spanish, or French within Spanish jurisdiction, and for the suppression of the deposit at New Orleans, to be arbitrated and settled by commissioners in the manner agreed upon in the unratified convention of 1802.

4. The lands in East Florida, and in West Florida, to the Perdido, to be made answerable for the amount of indemnities which may be awarded by the commissioners under this arbitration, with an option to the United States to take the lands and pay the debts, or to sell the lands for the payment of the debts, distributing the amount received equally, according to the amount of their respective liquidated claims, among the claimants. No grants of land subsequent to the 11th of August, 1802, to be valid.

5. Spain to be exonerated from the payment of the debts, or any part of them (p. 464.)

The Chevalier de Onis replied on January 24, 1818, with this proposition:

The dividing line between Louisiana and the Spanish possessions to be established in one of the branches of the Mississippi, either that of La Fourche, or of the Atchafalaya, following the course of that river to its source. Spain to cede the two Floridas to the United States in full and complete sovereignty.

As an alternative he proposed:

The western line of division to be established from the sea, at a point between the rivers Carcasa and the Mermento, or Mermentao, running thence by Arroyo Hondo, till it crosses the Colorado at Natchitoches, between that post and Adaes, thence northward to a point to be fixed and laid down by commissioners respectively appointed for the purpose.

He proposed that the respective claims of Spain and the United States against each other should be the subject of arbitration by a joint commission, but limited somewhat the scope of the American claims. (P. 466.)

On March 12, 1818, Mr. Adams stated that the Spanish terms could not be accepted, and discussed the various matters at some length (pp. 468–480).

On March 23 De Onis replied with arguments in support of the Spanish position (pp. 480–486), but made no further propositions until October 24, 1818, when he offered to agree to the cession of Florida, the renunciation of the respective claims of the two Governments against each other, and the following boundary:

> To avoid all cause of dispute in future, the limits of the respective possessions of both Governments to the west of the Mississippi shall be designated by a line beginning on the Gulf of Mexico, between the rivers Mermento and Calcasia, following the Arroyo Hondo, between the Adaes and Natchitoches, crossing the Rio or Red River at the thirty-second degree of latitude and ninety-third of longitude from London, according to Melish's map, and thence running directly north, crossing the Arkansas, the White, and the Osage rivers, till it strikes the Missouri, and then following the middle of that river to its source, so that the territory on the right bank of the said river will belong to Spain, and that on the left bank to the United States. The navigation, as well of the Missouri as of the Mississippi and Mermento, shall remain free to the subjects of both parties (p. 529.)

Mr. Adams replied on October 31, agreeing to the proposition as to Florida and the claims, but proposing

a boundary more favorable to the United States, as follows:

> Beginning at the mouth of the river Sabine, on the Gulf of Mexico; following the course of said river to the thirty-second degree of latitude; the eastern bank and all the islands in said river to belong to the United States, and the western bank to Spain; thence due north to the northernmost point of the thirty-third degree of north latitude, and until it strikes the Rio Roxo, or Red River; thence, following the course of said river to its source, touching the chain of the Snow Mountains in latitude thirty-seven degrees twenty-five minutes north, longitude one hundred and six degrees fifteen minutes west, or thereabouts, as marked on Melish's map; thence to the summit of the said mountains, and following the chain of the same to the forty-first parallel of latitude; thence, following the said parallel of latitude forty-one degrees to the South Sea. The northern bank of the said Red River and all the islands therein to belong to the United States, and the southern bank of the same to Spain (p. 530–531).

On November 16, 1818, De Onis submitted another proposition as to the boundary, as follows:

> My third proposal refers to the boundary line to be established between the possessions of the Crown of Spain and those of the United States. Acceding, as far as possible for me do, to the modification proposed by you, and with a view of offering to the United States an additional proof of my wish to remove existing difficulties, I will undertake to admit the river Sabine instead of the Mermento as the boundary between the two powers, from the Gulf of Mexico, on the condition that the same line

proposed by you shall run due north from the point where it crosses the Rio Roxo (Red River) till it strikes the Mississippi [Missouri], and extend thence along the middle of the latter to its source, leaving to Spain the territory lying on the right and to the United States the territory lying on the left of the same (p. 532).

On November 30, 1818, Mr. Adams wrote that the United States would not agree to these terms and reserved its rights to the boundary on the Rio Bravo del Norte (p. 545).

De Onis made some further concessions in December, 1818, and January, 1819 (pp. 612–616), which were refused January 29, 1819 (p. 616).

On February 1, 1819, De Onis made a further concession, as follows:

> In consideration of these obvious reasons, I propose to you that, drawing the boundary line from the Gulf of Mexico by the river Sabine, as laid down by you, it shall follow the course of that river to its source; thence, by the ninety-fourth degree of longitude, to the Red River of Natchitoches, and along the same to the ninety-fifth degree, and crossing it at that point to run by a line due north by the Arkansas, and along it to its source; thence, by a line due west, till it strikes the source of the river San Clemente, or Multnomah, in latitude forty-one degrees, and along that river to the Pacific Ocean; the whole agreeably to Melish's map (p. 617).

On February 6, Mr. Adams made a counter-proposition:

> It is agreed that the western boundary between the United States and the territories of Spain shall be as follows: Beginning at the mouth of the river

Sabine, on the Gulf of Mexico; following the course of said river to the thirty-second degree of latitude, the eastern bank and all the islands in the river to belong to the United States, and the western bank to Spain; thence, due north, to the northernmost part of the thirty-third degree of north latitude, and until it strikes the Rio Roxo, or Red River; thence, following the course of said river, to the northernmost point of the bend, between longitude 101° and 102°; thence, by the shortest line, to the southernmost point of the bend of the river Arkansas, between the same degrees of longitude 101° and 102°; thence, following the course of the river Arkansas, to its source, in longitude 41° north; thence, following the same parallel of latitude 41°, to the South Sea. The northern banks and all the islands in the said Red and Arkansas rivers, on the said boundary line, to belong to the United States, and their southern banks to Spain: the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818 (p. 617).

On February 9 De Onis proposed:

The boundary line between the two countries shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea; continuing north along the middle of that river to the thirty-second degree of latitude; thence by a line due north to the thirty-third degree of latitude, where it strikes the Rio Roxo of the Natchitoches (Red River), following the course of the Rio Roxo to the westward to the one hundredth degree of longitude and thirty-third and one-fourth degree of latitude, where it crosses that river; thence by a line due north, by the said one hundredth degree of longitude from London, according to Melish's map, till it enters the river

Arkansas; thence along the middle of the Arkansas to the forty-second degree of latitude; thence a line shall be drawn to the westward, by the same parallel of latitude, to the source of the river San Clemente, or Multnomah, following the course of that river to the forty-third degree of latitude, and thence, by a line due west, to the Pacific Ocean. All the country belonging to His Catholic Majesty included in said line to the eastward His Majesty cedes to the United States, in full property and sovereignty, forever; as also the islands in the rivers Sabine, Red River of Natchitoches, Arkansas, and Multnomah that may be situated within the limits which are here pointed out; both parties to maintain the navigation of all of them free as respects the parts thereof which constitute their frontiers (p. 618).

On February 13 Mr. Adams replied with a proposition making the one hundred and second meridian the boundary between the Red River and the Arkansas, and varying from the terms of De Onis in some other respects (pp. 619, 620).

On February 16 the boundary was finally agreed upon, as stated in the treaty of February 22, as follows:

> The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red River; then following the course of the Rio Roxo westward to the degree of longitude one hundred west from London and twenty-three from Washington; then crossing the said Red River,

and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas to its source in latitude forty-two degrees north, and thence, by that parallel of latitude, to the South Sea; the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818. But if the source of the Arkansas River shall be found to fall north or south of latitude 42 degrees, then the line shall run from the said source due north or south, as the case may be, till it meets the said parallel of latitude forty-two degrees, and thence along the said parallel to the South Sea; all the islands in the Sabine and the said Red and Arkansas rivers throughout the course thus described to belong to the United States, but the use of the waters and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of said boundary on their respective banks, shall be common to the respective inhabitants of both nations (p. 623-4).

It is very clear from these negotiations that Mr. Adams's proposition of January 16, 1818, that Florida should be ceded by Spain as an equivalent for all claims of the United States against the Spanish Government, was ultimately adopted, and that the establishment of the western boundary of Louisiana did not depend upon the cession of Florida, but was a compromise between the claims of the two countries, whose representatives, each beginning with claims for a large district whose possession the other was unwilling to concede, and then each withdrawing his boundary by successive steps, ultimately reached a point of agreement about halfway between the

limits of their original pretentions. The original Spanish proposition, viz, that Florida should be exchanged for territory of the United States, was certainly not adopted, as the treaty secured to Spain no territory which she had at any time conceded to be within the limits of the United States, but, on the contrary, secured to the United States an indisputable title to a large district in Louisiana to which Spain had hitherto laid persistent claim.

That the establishment of the boundary was not really regarded by either party as a cession of territory is shown by the words of the treaty. In the second article "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida," and the fifth provides that "the inhabitants of the ceded territories shall be secured in the free exercise of their religion, without any restriction; and all those who may desire to remove to the Spanish dominions shall be permitted to sell or export their effects, at any time whatever, without being subject in either case to duties." Article 3, on the other hand, defines the boundary and then merely provides for a mutual cession and renunciation of "all their rights, claims, and pretensions to the territories" on either side of the boundary respectively, with no provision for the removal to the United States of any persons living on the Spanish side of the line. This shows that all that passed by the third article were "rights, claims, and pretensions," not territory, as in the case of Florida.

No intention in 1820 to disregard the Spanish treaty.

In view of the character of the negotiations which had taken place, there is no warrant whatever for holding that in 1820, when the Choctaw treaty was made, the Administration and the Senate intended to disregard the Spanish treaty, on account of the delay in its ratification, or to grant to the Choctaws any land which that treaty had recognized as within Spanish borders. Some oratory was expended against the treaty in Congress, but nothing was done that hindered the ultimate ratification in any way, and from the signing of the treaty in February, 1819, until its second ratification and final proclamation two years later, the executive branch of the United States Government did everything in its power to establish the treaty. It is sometimes said, as in *Meade* v. *United States* (2 C. Cls. R., 224, 255), that Spain refused to ratify the treaty, but the word "refusal," used by Casey, C. J., in the opinion in that case, goes beyond what the facts warrant. Delay on the part of Spain there undoubtedly was, and failure to ratify within the time set in the treaty, but no positive refusal to ultimately ratify when satisfactory explanations as to certain vexed questions should have been received. In fact, in all its dealings with this Government, Spain never took a single step which was inconsistent with that ultimate ratification which eventually took place. It sent over, early in 1820, a special envoy, General Vives, to obtain certain explanations in regard to the treaty. It did, indeed, entertain and liquidate Mr. Meade's claim, although it was not required to do so if the treaty was to be ratified, as

in that case the ninth article would operate to relieve Spain of its liability. Just what it was that induced Spain to do this while there was still a probability of ultimate ratification does not appear, but the liquidation of the Meade claim could not possibly hinder the ratification, and Spain was very careful not to pay the money.

It is true that on August 21, 1819, Mr. Forsyth, the American minister, wrote to the Spanish Government that as the ratifications had not been exchanged, "all the claims and pretensions of the United States * * * will stand in the same situation as if that convention had never been made" (Am. State Papers, For. Rels., Vol. IV, p. 661); but the decided language of Mr. Forsyth was never adopted by the Government of the United States, which never attempted nor threatened to close the door against ratification. The letter of the Secretary of State to the Spanish minister of May 3, 1820 (id., 683), regrets that the latter is not authorized to exchange ratifications there and then, but agrees that if the minister will give a promise of ratification by Spain the President will refer the matter to the Senate for action. Even after it appeared that a positive promise could not be obtained, negotiations were not broken off, but the President referred the correspondence to Congress for its decision as to the further delay requested by the Spanish minister. (See Mr. Adams's letter of May 8, 1820, same vol., 685.)

The message, dated May 9, 1820, clearly invites Congress to acquiesce in the request for further time, and for the reason that the United States had nothing to lose and much to gain by such forbearance. The message concludes with the words, "I submit it to the wisdom of

Congress whether it will not still be advisable to postpone any decision on this subject until the next session." (Messages, Vol. II, p. 72.) Congress adopted this policy of forbearance, and the annual message of November 14, 1820 (id., 75), stated that the result of the deliberations of the Cortes (a result which the President manifestly expected would be favorable, as proved to be the case) was "daily expected."

The Spanish delay was partly due to the disturbed condition of that country, ending in the reestablishment of the constitution of 1812 (Am. State Papers, For. Rels., Vol. IV, p. 689); but the new Cortes authorized the ratification of the treaty October 8, 1820, and the King of Spain ratified it on October 24. (Same vol., pp. 694, 702.) The American minister at once communicated these facts to the Secretary of State, and while, with the slow communications of that day, the Senate may not have known the facts by December 21, when it finally ratified the Choctaw treaty, yet it is clear from the President's message of May 9, 1820, concluding that "there is just ground to presume that our differences with Spain will be speedily and satisfactorily settled," as well as from the message of November 14, and the constant communications between the American minister and the Secretary of State, that ultimate ratification was daily expected. (Same vol., pp. 676–694.)

The only bearing of the negotiations with Spain in 1819–1821 upon the present case is as an indication of the probable intention of the United States Government in regard to the Choctaw treaty of 1820. The court below has held, not merely that until the ratifications of

the Spanish treaty were exchanged in 1821 the United States owned the land west of the line fixed as the boundary in that treaty, but also that the President, the Senate, the Secretary of War, and the treaty commissioners all *intended* to grant to the Choctaws land west of that line, and did so with their eyes open. This view, it is submitted, presupposes utter want of good faith, and even of ordinary sanity, on the part of the Government.

Undoubtedly the Government had the power to include, *on paper*, land west of the one hundredth meridian in its grant; but unless the Spanish treaty had finally fallen through, such a grant would have conveyed nothing as against Spain. The ratification of a treaty relates back to the time of signing, and where territory is ceded by treaty the exercise of sovereignty by the ceding country ceases *at the time of signing*, except for strictly municipal purposes, so that the ceding country can not grant lands in the ceded territory even before ratification. The reason for this has been stated by this court as follows:

> After the treaty is made, there is not in either [the ceding country or the country receiving the cession] the union of possession and the right to the territory, which must concur to give *plenum dominium et utile*. To give that, there must be the *jus in rem* and the *jus in re*, or what is called in the common law of England the *juris et seisinæ conjunctio*. (*Davis* v. *Police Jury*, 9 How., 280, 289.)

It being well known to the President and the Senate, as an established doctrine of the law of nations, that unless they threw over the Spanish treaty altogether on account of the delay (which was the last thing that they then wished to do), they had no power to grant any land

beyond the borders of the United States as established by the treaty, it is utterly unreasonable to hold that they deliberately undertook to make such a grant to the Choctaws. The view of the court below involves the supposition that the President and the Senate intended either to create an Indian claim against Spain for land which the treaty of 1819 declared was Spanish, or else to make a grant of land which they neither wished nor expected the grantees to receive, thereby exposing the United States to a claim for a partial failure of its grant. Neither intention could have been entertained by sane men. The only rational conclusion is that the President and the Senate did not intend to grant to the Choctaws one foot of land west of the one hundredth meridian.

Major Long's discovery of the source of the Canadian was not actually known to the President, the Secretary of War, or the Senate.

Fourth. Although the facts as to the actual location of the source of the Canadian were known to an officer of the United States Army and his men thirty-eight days before the Choctaw treaty was signed, these facts could not have been known to the United States commissioners or to the Choctaws when they made the treaty, and there is no evidence that any information as to the true source of the Canadian was communicated to the President or the Senate before the treaty was ratified.

The court below holds, however, that Long's discovery of the course of the Canadian, communicated in a brief report to the War Department, received in November, 1820, so affected the Government with knowledge of the source of the Canadian that "the presumption *must be*

that the treaty-making powers had this knowledge." (Rec., 393.) It is submitted that this presumption is wholly unwarranted. The facts as to Long's discovery and the report of it are as follows:

Maj. Stephen H. Long, of the Topographical Engineers, had left Pittsburg May 3, 1819, in command of an expedition to explore "the Mississippi, Missouri, and their navigable tributaries," by order of the Secretary of War. On July 24, 1820, the party, being then on the Arkansas River, about 103° 50′ west, separated, one party, under Captain Bell, proceeding down the Arkansas, while the other, under Major Long himself, started for the Red River, intending to follow it down from its source. On July 30 they reached the dry bed of a stream, and on the 31st its confluence with a creek which apparently contained water. From their course, as shown on Long's map, they seemed to have been then on that branch of the Canadian which is still called Red River, though the map erroneously calls it Rio Mora. They followed along by this stream until September 10, when they reached a river, which, to their "no small disappointment," they perceived to be the Arkansas. (Rec., 275.) They reached Belle Point (Fort Smith) September 13, and the next day Major Long wrote the last of the series of brief reports that he had sent to the Secretary of War from time to time, containing the following statement:

> I regret that for want of a guide and a proper knowledge of the country that the detachment accompanying me were led into a mistake and explored the Canadian of the Arkansas instead of the

> Red River. On parting from Captain B.'s detachment we proceeded southwardly about 150 miles farther, in view of the mountains, and came to a brook running in a southeastwardly direction, which, according to Pike's map and description of the country, our only guide, we took to be a branch of Red River. After pursuing it downward more than 100 miles we fell in with a party of Indians of the nation of Bad Hearts, who confirmed us in this opinion by repeatedly assuring us that the stream on which we were traveling was Red River. Having traversed it by our courses about 800 miles, by its meanderings more than 1,000, we arrived at its confluence with the Arkansas, and discovered our error when it was too late to retrieve it. (Rec., 266.)

This report, by its indorsement, seems to have reached the War Department in November, 1820, and soon after Major Long was himself in Washington, where orders were sent him November 24, 1820, to repair to Philadelphia and as soon as practicable furnish a report of the country traversed by his expedition, with a map. (Rec., 266, 267.) This report bears date Philadelphia, February 20, 1821 (Rec., 272), and concludes with a statement that the map "shall be reported as soon as the necessary elements and data can be compiled and the drawings executed," showing that the map, which was for practical purposes more important than the report, did not exist till some time after the Choctaw treaty was ratified.

It is clear that the Secretary of War *could*, if he had made inquiry, have known in November, 1820, that the Canadian rose far to the west of where the maps of the day placed its source, but there is no proof whatever that

de did know it, and the fact that he made no communication at any time, either to the President or to the Senate, in regard to Major Long's discovery (Rec., 268), although he transmitted the Choctaw treaty on December 12, shows conclusively that he did not know it.

Secretary Calhoun's ignorance is not at all remarkable. He could not personally attend to every detail of the work of his Department, which occupied the place of both the War and Interior Departments of the present day. Major Long's report of September 14, 1820, was presumably read by the officer in charge of the Topographical Bureau, but it is most unlikely that the Secretary ever saw it. When Major Long reported at headquarters, there is no probability that he saw the Secretary. Major Long could have been in Washington but a very few days at most, and, besides, he was out of health. Moreover, he had been traveling for more than eighteen months over a large extent of country, and he probably considered his stumbling on the head waters of the Canadian as a minor incident in his explorations. His report of September 14, 1820, expresses no satisfaction over a discovery, but only regret that he had wasted his time in following down the Canadian instead of exploring the Red River, as he had wished.

Presumably Major Long's orders of November 24, 1820, emanated from the head of the Topographical Bureau, and were signed by the Secretary of War as a matter of office routine. The instructions to prepare a map indicate that Long had at that time no map showing his route, and Long's subsequent promise to furnish it "as

soon as the necessary elements and data can be compiled," shows that the preparation of the map was a lengthy task. Without a map, the chief impression conveyed by the report of September 14, 1820, would be that the source of the Red River was not where it was supposed to be, but not that there was anything specially erroneous about the supposed location of the source of the Canadian.

To persons living in the present days of phenomenally rapid diffusion of information it may seem extraordinary that the importance of Long's discovery of the source of the Canadian, as bearing upon the language of the Choctaw treaty, should not at once have been observed and published to the world. That it was not, simply marks the difference in conditions between 1820 and the present day. Had Long himself known of the making of a treaty naming the Canadian "to its source" as the boundary of a cession, he would of course have realized that those words were used under a misapprehension of the real geography of the country, and would have so informed the Secretary of War. That there is no record of his so doing is proof that he knew nothing of the treaty. The treaty was made October 18, 1820, near Natchez, when Long was at St. Louis, whence he returned to Cape Girardeau about November 1, thence, though in ill health, he went to Washington (Long's Expedition, Vol. II, pp. 321, 324). His reports and orders show that he left Washington for Philadelphia before the treaty arrived. Under these circumstances it would not be surprising, even to-day, that he, having nothing to do with the making of treaties himself, should not know that the treaty was being made,

or at all events, that it referred to the source of the Canadian, and it is still less surprising in view of the conditions prevailing in 1820.

Whatever be thought of Secretary Calhoun's ignorance of Long's discovery and of its bearing on the Choctaw treaty, there is certainly nothing surprising about the ignorance of the President and the Senate, as they had nothing to do with Long or his report, which remained on the files of the War Department, his discoveries not being published to the world until 1822. At all events, it would seem that the fact of their ignorance could no more admit of serious question than the fact of equal ignorance on the part of Generals Jackson and Hinds and the Choctaws themselves, who had had no possible chance to know of Long's discovery at the time they made the treaty.

In spite of all this the court below says:

> It is certain that the Government was in possession of information before the ratification of the treaty that the source of the Canadian was far to the west of the one hundredth meridian as delineated by the earlier maps, and in the absence of proof it can not be assumed that the treaty was ratified with the knowledge that the boundaries fell short of the actual source of that river.
>
> There is as much reason to say that the maps which excluded from the cession much of the country now occupied by the Chickasaws were used as to say that the other maps then in existence delineating the source of the Canadian about the one hundredth meridian were made the basis of the treaty boundaries. The use of all the maps involve contradictions and destroy the value of the argument. Upon the question of intention we think it more probable that

> the Government originally intended to acquire from the Quapaws, and also intended to grant to the Choctaws, all the territory west of the one hundredth meridian to the dominions of Spain.
>
> The ratification of the Spanish treaty which fixed the boundary of the United States on the line of the one hundredth meridian was subsequent to the ratification of the treaty with the Choctaws which gave to those people the land that extended to the source of the Canadian. With the ratification of the Spanish treaty, however, such title as had been granted to the Choctaws [west of the one hundredth meridian] became extinguished, * * * but the right to compensation for the value of the land remained with the Choctaws as against the Government which first gave, and then took from them, the land. (Rec., 394–395.)

The above statement involves, in the first place, a serious misunderstanding in regard to the maps. As has been already shown, in considering the geography of this region as it was understood when the Quapaw treaty was made, there are no earlier maps delineating the source of the Canadian as far to the west of the one hundredth meridian. The two small scale maps of De l' Isle, and that of Boehme, cited by the court below, do not show any stream that could have been intended or understood to represent the Canadian. The maps "which excluded from the cession much of the country now occupied by the Chickasaws," i. e., the maps which showed the source of the Canadian east of the ninety-eighth meridian, were merely the two English maps of Pinkerton and Arrowsmith, who for some reason did not choose to follow Pike in matters of longitude, though copying him in other respects, but these maps were not regarded as authorities in the United

States, where Pike's map was the standard for that particular locality, and Melish's for the country as a whole. There is simply no reason whatever to say that these English maps, based on American data at secondhand, and marked only by arbitrary departures from the recognized authority, "were made the basis of the boundaries." It is true that "the use of *all* the maps involves contradiction and destroys the value of the argument," but a person who understood the maps would not attempt to use *all* of them; he would distinguish between them, and recognize that some were based on original information and others not; that some were accepted as standards and others not, and that some undertook to give geographic details, while others, covering a much larger expanse of country, on a very much smaller scale, gave merely a conventional representation without any regard to actual detail. If the maps are properly understood, no difficulty whatever need result.

In the second place, the fact that "the Government was in possession of information, before the ratification of the treaty," as to the source of the Canadian, is only evidence tending to show actual knowledge by the President and the Senate of the facts stated in Long's report of September 14, 1820. The court below has practically regarded the receipt of Long's report by the War Department as constructive notice to the President and the Senate of the contents of that report. The court's language is rather obscure, but it seems to assert that where certain officers of the Government cooperate to perform an official act, and certain other officers, not concerned with the performance of such act, possess the

knowledge of certain facts, which if known by the former would give to their act an effect which it would not otherwise have, the Government is estopped from denying that the knowledge of the latter officers was imparted to the former, although it may, in point of fact, never have been actually imparted either to them or to the other parties concerned in the act until after the act was performed. This is certainly going very far. The doctrine that a Government is charged with the knowledge possessed by its officers only holds where the neglect to act on such knowledge has caused injury to other parties. A familiar instance is where a city officer has knowledge of the defective condition of a public highway, and the city does not remedy the defect, and some one is injured (*Logansport* v. *Justice*, 74 Ind., 378; *Carrington* v. *St. Louis*, 89 Mo., 208; *Rehberg* v. *New York*, 91 N. Y., 137); but even in such cases the officer must have some duties connected with the highway in order to affect the city with notice. (*Cook* v. *Anamosa*, 66 Iowa, 427.) In the present case the Choctaws were in no way injured by the failure of the President and Senate to avail themselves of Major Long's knowledge, and to amend the treaty so as to make the description run to a point not farther west than the one hundredth meridian, in accordance with the intention of the parties. To construe the treaty as covering a grant to where the source of the Canadian was believed to be, instead of where it really was, would never at any time have taken away from the Choctaws anything that was really theirs, but would give them precisely what they expected to receive and what the United States intended to grant.

If the President and the Senate had known of Long's discovery, at any time while the treaty was before them, and had not become suddenly insane, it is absolutely certain that they would have at once amended the treaty, not merely because they would have known that they were granting territory which they had already agreed should belong to Spain, but also because they would have seen that the boundary was an impossible one, and called for *some* change before any tract of country could be laid off by it. Had they even intended to grant to the Choctaws land west of the one hundredth meridian, shutting their eyes (as the court below thinks they did) to the effect of the Spanish treaty, which they were eagerly awaiting an opportunity to ratify anew, they would still have had to amend the description in the Choctaw treaty. No men in their senses would have knowingly approved a treaty containing so gross an error of description as to make the described boundary impossible. They would have changed it *in some way*, even if they had run it far west of the one hundredth meridian. To say, therefore, as the court below has said, that "it can not be assumed that the treaty was ratified with the belief[1] that the boundaries fell short of the actual source of" the Canadian, is to say that it can not be assumed that the President and the Senate were sane, since unless they either held that belief or were insane they would never have ratified the treaty without some change in its language.

[1] The court below says "knowledge," but as it is impossible to *know* that a thing is where it is not, "belief," and not "knowledge," must be what is meant, and the word "belief" has accordingly been used above.

Had the Spanish treaty ceded any Choctaw lands, the Choctaw treaty of 1825 would not have been silent about it.

The fact that the Canadian had its source in the Rocky Mountains was made known to the world in 1822 by the publication of the account of Long's expedition of 1819–20, with an accompanying map, and thereafter Melish and other American map makers showed the source correctly; but it was not until July, 1854 (Sen. Mis. Doc. No. 31, Thirty-fourth Congress, first session, p. 42), that the Choctaws undertook to claim that the treaty of 1820 had granted them any land west of that one hundredth meridian which, by the Spanish treaty of 1819, was fixed as the western boundary of the United States in that quarter. On January 20, 1825, a treaty with the Choctaws was made at Washington, whereby the Choctaws, in consideration of a perpetual annuity of $6,000, re-ceded to the United States the easternmost portion of the cession of 1820, being the portion lying within the State of Arkansas. (7 Stats., 234.) The negotiations which led to this treaty are set out at length in the American State Papers (Ind. Aff's., Vol. II, pp. 549–558), and show that the Indians were thoroughly well informed as to the location of the land ceded them in 1820, and with its value, and that the United States was dealing fairly with them. Had anyone then considered that the cession of 1820 was to be interpreted in the light of Long's discovery, so that it covered land west of the then limits of the United States, the question would undoubtedly have come up and would have been settled at the time the eastern boundary of the cession was recti-

fied. The absence of all reference to the western boundary is proof that it was universally understood as located far enough east to be unaffected by the Spanish treaty.

The same understanding is manifest from the record of the unsuccessful negotiations of 1826, when it was sought to secure a complete emigration of the Choctaws (Am. State Papers, Ind. Affs., Vol. II, pp. 708–718), and also from that of those which resulted in the treaty of 1830. (Sen. Doc. No. 512, Twenty-third Congress, first session, Vol. VIII, pp. 251–261.) A portion of the Indians were adverse to a new treaty involving a cession of all their Mississippi lands, and they made their complaints and objections well known on both occasions. Certainly if they had had any complaint on account of any land ceded them in 1820 having been given away to Spain, it would then have been made, but the records may be searched in vain for any such complaint, although the new treaty stated specifically that the cession did not run beyond the limits of the United States. There is not the slightest evidence that the silence of the Indians as to the western boundary was due to any deception by the officers of the United States, and certainly no such deception can be presumed.

It is submitted, therefore, under the authorities already cited in regard to the Quapaw treaty of 1818, that it being the intention of the parties to the Choctaw treaty of 1820 that the grant therein made should be bounded on the west by a line drawn due south from where they supposed the source of the Canadian to be, i. e., about the one hundredth meridian, the treaty must be construed in accordance with that intention.

(3.)

The Choctaw treaty of 1830 annulled that of 1820. (See the fourth assignment of error.)

Even had the facts been otherwise, and had the treaty of 1820 granted to the Choctaws land west of the one hundredth meridian, the treaty of September 27, 1830 (7 Stats., 333) must have annulled such grant and extinguished all claims on account of it. By that treaty it was proposed to effect a complete settlement of the Choctaws in the West, and the whole matter was provided for *de novo*. The western bounds of the country which the United States by this treaty agreed to convey to the Choctaws were expressed as running to the source of the Canadian Fork, if in the limits of the United States, or to those limits; thence due south to Red River; and Article I provided that "all other treaties heretofore existing and inconsistent with the provisions of this are hereby declared null and void." The provisions of the treaty of 1830 differed considerably from those of 1820. The Indians ceded to the United States all their land in Mississippi (except certain portions to be allotted to individuals who wished to remain and become citizens), and in consideration of this increased cession the United States made certain promises, the nonperformance of which ultimately led to a suit in which the net proceeds of the sales of the lands ceded by the Choctaws were awarded to them as damages. (*Choctaw Nation* v. *United States*, 119 U. S., 1.) Both parties undertook to enter into a new agreement in regard to lands and emigration, and hence all previous treaties inconsistent with the new

treaty were declared null and void. The uncertainty expressed as to the location of the source of the Canadian Fork is peculiar, as Melish's and other maps had shown it correctly since 1823, but the reference to "the limits of the United States" established beyond question the one hundredth meridian as the western boundary of the cession.

There can be no doubt that the intention was to nullify the entire treaty of 1820, for the words are not "all parts of other treaties heretofore existing which are inconsistent with the provisions of this," or "all other treaties heretofore existing, so far as inconsistent with the provisions of this," but "all other treaties heretofore existing and inconsistent with the provisions of this." The treaty of 1820 was inconsistent with the provisions of that of 1830, and hence the former was, in its entirety, declared null and void.

The statement in *Choctaw Nation* v. *United States* (119 U. S., 1, 38), that the land west of the Mississippi "had already been secured to them [the Choctaws] by its cession under the treaty of 1820," can not be understood as meaning that that cession had not been nullified. It simply means that the lands ceded to them by the treaty of 1830 were the same that had previously been ceded to them by the treaty of 1820, that their area was not increased to balance the increased area ceded by the Choctaws, so that the consideration for the increase must be looked for elsewhere.

Even if it could be possible to uphold any part of the treaty of 1820 as not inconsistent with that of 1830, the nullifying clause restricts the cession of land to that made

by the latter treaty, for if the cession of 1820 differed from that of 1830, then it was inconsistent with it, and consequently "null and void." In the court below it was attempted to make a fine distinction between the two, to the effect that the treaty of 1820 ceded a certain tract of country to the Choctaws, while that of 1830 merely covenanted to convey a certain tract "in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," so that the two are not to be regarded as inconsistent. It is manifest, however, that the intention was the same in both cases, i. e., to give the Indians a tract of country which was to belong to them as long as they occupied it, and if the boundaries of the two grants were not the same, then the first grant was clearly inconsistent with the second, and became null and void when the treaty of 1830 was made.

If any part of any treaty should ever be held binding upon any Indian tribe, so as to estop it from denying that it was bound thereby, the annulment clause of the treaty of 1830 should be held binding upon the Choctaws to estop them from claiming that there remained to them, after 1830, any right to any land granted in 1820 and not in 1830. If there is one thing that the treaty of 1830 makes plain, it is that it was intended to settle and establish the rights of the Indians in regard to land. The cessions on both sides were made over again, just as if there had been no prior cessions. A portion of the cession of 1820 had been given up by the Choctaws in 1825 in consideration of an annuity of $6,000 (7 Stats., 234),

and Article XVII of the treaty of 1830 provided that all annuities secured under former treaties should continue. This shows a consistent purpose to leave no claims of the Choctaws in regard to land outstanding, but to provide for everything. The Indians agreed to the new provisions and received the new considerations, and therefore they had no right afterwards to assert any claim on account of a supposed cession in 1820 of land not included in the cession of 1830.

The fact that the Choctaws had no real, substantial claim on account of land west of the one hundredth meridian is shown by the absence of all reference to such claim in the treaty of 1837 between them and the Chickasaws. (7 Stats., 605.) Had such a claim then existed that treaty would have referred to it, either to admit the Chickasaws to a share in it or to exclude them therefrom. The silence of that treaty shows that no one thought of such a claim at that time, and in fact there is no evidence that any such claim was ever brought forward by the Choctaws until the time of the negotiations which resulted in the treaty of 1855.

The opinion of the court below says that the treaty of 1830, in spite of its plain language, could not have been intended to nullify that of 1820, because that would have taken away the right to any claim for land west of the one hundredth meridian, without compensation. (See Rec., 395.) The answer to this criticism is that it is practically certain that both parties recognized that no such claim existed, as no such land had ever been granted by the treaty of 1820, but that even if such claim was

recognized it must have been taken account of in the new considerations promised in the treaty of 1830, which was, in the words of Article I, to "be considered *the treaty* existing between the parties."

(4.)

The quitclaim of 1855 was merely a correction of the terms of the cession of 1820 in accordance with the original intention of the parties.
(See the fifth assignment of error.)

It has been sufficiently shown above that the intention of the parties to the treaty of 1820 was that the lands ceded to the Choctaws should extend to where the parties believed the source of the Canadian to be, i. e., to about the one hundredth meridian, so that the Choctaws could have had no valid claim to any land west of that meridian; and further, that the subsequent annulling of the treaty of 1820 would have ended such a claim if it had ever existed. The necessary conclusion from this state of facts is that when by the treaty of June 22, 1855, the Choctaws relinquished to the United States "all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude," and also, in common with the Chickasaws, leased to the United States the land between the ninety-eighth and one hundredth meridians and the Canadian and Red rivers, and the United States paid $600,000 to the Choctaws and $200,000 to the Chickasaws "in consideration of the foregoing relinquishment and lease," this consideration was paid entirely for the lease, the relinquishment being merely the formal correction of an error in description in the treaty of 1820. This error

in description (describing the Choctaw cession as running to the source of the Canadian, when it was only intended that it should run to where that source was believed to be), occurring in treaty, called for correction in an instrument of the same character, but as it could not justly have given rise to any claim, its correction could not fairly have been the subject of compensation. It was the duty of the Choctaws, by all the rules of fair dealing, to consent to the correction of the error and to the restriction of the cession to its legitimate limits, without asking any compensation whatever, so that evidently any demand for compensation must have been due either to ignorance or to greed; and while it is conceivable that the Government might yield to such a baseless and unjust demand in order to avoid dispute, yet certainly such yielding is not a thing to be presumed, and it can not be believed to have occurred, except on clear proof.

The court below has held, however, that the claim for compensation for land west of the one hundredth meridian was valid, and further, that the United States recognized the claim and paid at least a portion of the $800,000 to extinguish it, though what portion of that sum was so paid it does not attempt to say. (Rec., 395–396.) The second point is practically a corollary of the first, for if the claim was valid, every presumption would favor the conclusion that the Government recognized it as such. That the court below was in error on the first point has already been shown, and it is submitted that the record of what transpired in 1854 and 1855 makes it clear that the court has erred as to the second point also.

The making of the provision for the quitclaim and the lease came about in the following way:

By an agreement made January 17, 1837 (7 Stats., 605), the Choctaws sold to the Chickasaws certain rights and privileges, including the privilege of forming a district within the Choctaw country, which district embraced the portion lying between the Canadian and Red rivers, west of an irregular boundary therein specified, which apparently could not have been really followed in any actual survey (Sen. Ex. Doc. No. 1, Thirty-third Congress, second session, Part I, p. 339), but was intended to run from a point 8 or 10 miles below the mouth of the False Washita to a point 10 or 12 miles above the mouth of the South Fork of the Canadian. This district was not to belong to the Chickasaws exclusively, as the right to dispose of it was declared to be held by the Choctaws and Chickasaws in common, and both Choctaws and Chickasaws were entitled to settle in any part of the Choctaw country.

Various dissensions and controversies having arisen between the Choctaws and Chickasaws, the two tribes sent delegates to Washington in 1854 to arrange all matters in dispute between them, and also certain matters of controversy with the United States.

In July, 1854, after the negotiations had been going on for three months, the Choctaw delegates made the following statement, in a communication evidently colored by a certain measure of irritation that their previous demands had not yet been acceded to:

> Our country extends west to the head waters of the Canadian, about the one hundred and third de-

gree of west longitude, and we are prepared to maintain our rights to a boundary that far west by facts and evidence which can not be disputed. In the compromise with Texas in 1850, that portion of our country west of the one hundredth degree of west longitude was assigned to that State in direct and palpable violation of our rights. We must demand to be repossessed of this portion of our country; and, if this is not done, our people will take possession of it and leave the Government to settle with Texas and the Indians upon it for such damages as they claim. (Sen. Mis. Doc. No. 31, Thirty-fourth Congress, first session, p. 42.)

This was the first time that any such claim had, apparently, ever been made, and the statement was obviously one of those referred to by the Secretary of the Interior in a letter of September 25, 1854, as follows:

> The letter of the 11th of July last contains some expressions which, as I doubt not they were used without due reflection, I refrain from noticing. (Id., 45.)

Pending the negotiations, which had not theretofore concerned any acquisition by the United States of rights in any of the Choctaw and Chickasaw country, the special Indian agent for Texas wrote to the Indian Commissioner, February 1, 1855, as follows:

> I have the honor to suggest the propriety of negotiating with the Choctaw delegation now at Washington for a tract of land lying on the east side of the Red River (known as Cache Creek) near the Wichita Mountains, for the colonization of the Wichita Indians and such other prairie Indians as may be convenient to that location. (Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, p. 15.)

In accordance with this suggestion the Choctaw delegation was asked upon what terms they would agree to the settlement of the Wichitas and other Indians in their country. The answer first made by them was this:

> We are unwilling to lease, for the purpose mentioned, any portion of our country east of the ninety-ninth degree, but for the lease of that west of that degree we will consent, in behalf of our people, to take the sum of $400,000. (Sen. Mis. Doc. No. 31, Thirty-fourth Congress, first session, p. 60.)

If the Choctaw delegation really believed what they had previously stated, that their country extended "west to the head waters of the Canadian, about the one hundred and third degree," it is clear that what they were willing to lease for $400,000 included the country between 100° and 103°, but it is more likely that their proposal did not refer to country west of 100°, their claim therefor being chiefly valuable for purposes of argument. At all events the Secretary of the Interior had no idea of leasing country belonging to Texas, and his instructions to the Indian Commissioner were as follows:

> All things considered, [I] am disposed to think the proposition for the permanent accommodation of the Wichita and other Indians, and the amount demanded therefor, worthy your consideration; and you are authorized to enter into negotiations with the Choctaws on that basis. I think, however, that notwithstanding their claim to an extent of country west of the one hundredth meridian is regarded by the Department as without any foundation in law or equity, it might prevent further trouble in regard to it to insert an article in the supplemental treaty

or convention now to be held requiring the Choctaws to relinquish and abandon all right or claim to the same. (Ib., 61.)

Following these instructions the Choctaw agent asked the delegation:

> * * * Whether you will agree, the Chickasaws assenting, to lease the country included between 98° and 100° west longitude, and between Red and Canadian rivers, to the United States, for the permanent settlement of the Wichita and other bands of Indians within the territorial limits of the Choctaw Nation; and if so, upon what terms, it being understood that the Choctaws shall relinquish and quitclaim, in favor of the United States, whatever interest they may have in the country lying west of the 100° of west longitude. (Ib., 62.)

To this the Choctaw delegates replied:

> As a consideration for the whole arrangement, we would consent to take $800,000—one-half thereof for the lease of the country between 98° and 100° of west longitude, and the other half for the relinquishment of our right west of the latter degree.
>
> The above proposition has reference to the arrangement as a whole. Were it confined only to the lease of the portion of the country between the two degrees of longitude mentioned, we should, for obvious reasons, feel constrained to ask not less than $600,000 therefor. (Ib., 63.)

It is clear that the Government did not propose to buy up a claim whose validity it totally denied, but merely to lease the country between 98° and 100°, with which lease the relinquishment of all claim to country west of 100° was to be coupled, in order to "prevent further

trouble." Accordingly, adopting the terms which the Choctaw delegates stated they would demand for the lease alone, the agent replied:

> If the Choctaws will propose to lease to the United States the territory west of 98° and east of 100° west longitude (the Chickasaws assenting) and couple with it a relinquishment of all claim west of 100° west longitude, the Government will agree to pay them $600,000. (Ib., 63–64.)

These terms were ultimately accepted by the Choctaws, and as the Chickasaws agreed to take $200,000 for the lease of their interest in the country between 98° and 100°, the arrangement was incorporated into the treaty. The record shows conclusively that the whole consideration of $800,000 was paid for the lease, and that the relinquishment was demanded by the United States to "prevent further trouble" and as a condition of its agreement to the terms proposed by the Choctaws. The United States refused to pay for the relinquishment of the unfounded claim, but did not haggle over the terms of the lease. The Choctaws proposed first to lease the country west of 99° for $400,000, and then asked the same sum for the lease of the country west of 98°, provided $400,000 besides was paid for the relinquishment of the claim for country west of 100°, stating at the same time that by itself the lease was worth $600,000. The United States consented to pay the Choctaws $600,000 for the lease, but continued to demand that the relinquishment should be coupled with it without affecting the consideration, and to this the Choctaws ultimately agreed.

This agreement found its place in the treaty of June 22, 1885, in the following articles:

ARTICLE 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however*, The territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

ARTICLE 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct.

The division of the consideration between the Choctaws and Chickasaws in the proportion of three to one shows of itself that it was paid for the lease, in which the

Chickasaws joined, and no part of it for the quitclaim, which was made by the Choctaws alone, for otherwise the Chickasaws would have received more than their share.

In 1853 the population of the Choctaws and the Chickasaws was reported by the agents to those tribes as "not far from 15,000" and 4,709, respectively. (Sen. Doc. No. 1, Thirty-third Congress, first session, pp. 402, 407.) In the Indian Commissioner's report for 1855 the number of Choctaws west of Arkansas was stated as 16,000, and the number of Chickasaws as 4,787, taken from the annuity pay roll of 1854. (House Ex. Doc. No. 1, Thirty-fourth Congress, first sesssion, p. 575.) Schoolcraft's History of the Indian Tribes (vol. 4, p. 582; vol. 6, p. 690) gives the number of Choctaws and Chickasaws as 15,767 and 4,715, respectively, by the census of 1853. In short, while the ratio of the Choctaws to the Chickasaws in 1855 was rather more than three to one, it was so nearly that as to make it not unreasonable to adopt that ratio in the treaty as the basis of division of the fund given as the consideration for the lease. In point of fact this ratio of three to one is that which has always been taken to measure the respective interests of the Choctaws and the Chickasaws in the land ceded to the Choctaws in 1830, and in which they subsequently granted an interest to the Chickasaws. Thus, by Article III of the treaty of 1866, the consideration for the final cession of the leased district was divided on this ratio, and by Article XXXVII the consideration for the land to be selected by the Indians from Kansas was to be similarly divided. Hence, when it is provided that the

sum of $800,000 is to be divided between the Choctaws and the Chickasaws in the ratio of three to one, this fact shows that it represents the consideration for the conveyance of some interests in land which the Choctaws and Chickasaws held in common (in this instance the lease of what was thereafter called the leased district), and that it can not include the consideration for any relinquishment or conveyance of any right or interest belonging to the Choctaws exclusively. Had what the Choctaws received been intended to cover not merely the lease, but also the relinquishment of a substantial right to territory west of the one hundredth meridian, the disproportion between the amount received by them and that received by the Chickasaws would have been most unfair.

The court below has correctly stated that "the rights of the Choctaws and Chickasaws as between themselves had been fixed by agreement, with the consent of the Government, in the proportion of three-fourths to the former and one-fourth to the latter tribe in all land to which either tribe could lay claim" (Rec. 397), and it has also shown clearly enough that the quitclaim was executed by the Choctaws alone (Rec. 390–391), but it has wholly overlooked the fact that as the payment of $600,000 to the Choctaws and $200,000 to the Chickasaws was in proportion to their interest in the land which they leased, it must have been paid exclusively for the lease, leaving nothing for the quitclaim. The conclusion of the court below is therefore not warranted by its premises, which, as well as the other facts in the case, show convincingly that the United States paid to the Choctaws $600,000 for the lease of their share of the

leased district exclusively, just as it paid $200,000 to the Chickasaws exclusively for the lease of their share, the quitclaim of the Choctaws being something for which no consideration could fairly be asked, it being merely the formal correction of an inadvertent error of description in the treaty of 1820.

In this connection it may be proper to quote the language of the Indian Commissioner in 1860, as showing it to be the understanding of his office that the $600,000 were paid the Choctaws for the lease, and for nothing else:

> Under the treaty of 1855 the Choctaws leased a portion of their country, for which the United States paid the sum of $600,000. (House Ex. Doc. No. 82, Thirty-sixth Congress, first session, p. 3.)

As to the lease itself, it is rather difficult to see why the word "lease" was used, as there was neither term nor rental, two of the most usual features of a lease. On the contrary, there was a single sum of money (viz, $800,000) paid as consideration, and the object of the "lease" was expressed to be for the *permanent* settlement of the Wichitas and other Indians, facts which would indicate that the Choctaws and Chickasaws had permanently parted with their title to the district, except as to the right of settlement therein, which, as far as appears, they never exercised. Hence the word "lease" was really a misnomer. The reservation of the right of settlement by the "lessors" makes the conveyance one of an undivided interest in common, while the statement of the purpose of the conveyance seems to affix a trust to it. Altogether the conveyance was one of a very anomalous

character, and would seem to have been the work of persons who cared very little for the law of real estate. As, however, the land in question has for over forty years been known as the "Leased District," that designation will, as a matter of convenience, be used in this argument, but without being intended as an admission that the district was, strictly speaking, leased.

The court below, wholly overlooking the permanent character of the conveyance, insists that it was not merely of no higher character than a lease, but that it was not even that. The opinion says that it was "a mere permit" to use the country for special purposes, and that a future sale for the use of the lessors was implied. (Rec., 397.) Certainly no such sale could have been called for as long as the United States wished to use the country for the purpose specified in the treaty, and if such purpose was ultimately abandoned, a surrender to the "lessors," rather than a sale for their use, would have been more in keeping with the terms of the treaty. One reason set up by the court below for holding that the "lease" to the United States gave it very little right to the land of the district is that the Choctaws called it Hotubbee district, and empowered their principal chief to exercise authority over Choctaws residing therein until the district should "be duly organized" like the other districts of the Choctaw Nation (Choctaw Const. of 1860, preamble and Art. VII, sec. 1; Choc. Laws, 1869, 7, 18), the United States never objecting to this assumption of a right of government within the district. (Rec., 397.) The answer to this is that very soon after the adoption of the constitution containing the provisions referred to, the Choctaws made war

on the United States, and that this state of things lasted until 1865, when the steps which led to the treaty of 1866 were taken. Under these circumstances the Government concerned itself rather with the overt acts of the Choctaws than with their paper declarations. Besides, Hotubbee district never was organized by the Choctaws for the purposes of government, and if it ever had been so organized no government which the Choctaws could have established could have exercised any authority over any Indians whom the United States might settle there under the "lease," such Indians being, by the terms of the treaty, "subject to the exclusive control of the United States."

Another reason given by the court below for minimizing the effect of the "lease" is that unless the "leased district" had been included in the lands of the Choctaw Nation they would have had less land, in proportion to their numbers, than the Chickasaws had. (Rec., 397.) The answer to this is that, as regards the property rights of the Indians, the area of the respective districts assigned to the Choctaws and the Chickasaws was immaterial, the whole country being held by them "in common, so that each and every member of either tribe shall have an equal undivided interest in the whole." (Treaty of 1855, art. 2.) If the Choctaws thought the district assigned to the Chickasaws too large, all that they had to do was to go and settle there themselves. That the district "leased" to the United States was within the territory assigned to the Choctaws is true, but this fact merely gave the Choctaws a right of government over such Choctaws and Chickasaws as might settle there, and it in no way lessened the rights

of the United States secured to it by the "lease," which, be it observed, was made by both tribes together, and not by the Choctaws alone. The United States paid a substantial consideration for the "lease," and obtained substantial rights in the district.

B.

THE NATURE OF THE TITLE ACQUIRED BY THE UNITED STATES UNDER THE CESSION OF 1866.

(1.)

Articles XXX, XXXI, and XXXVII of the treaty of 1866 were intended to carry out the fifth stipulation, announced at Fort Smith in 1865. (See the sixth assignment of error.)

At the close of the rebellion the circumstances affecting the relations of the United States with the Choctaws and Chickasaws were as follows:

The United States held by what was called a lease the right to settle permanently the Indians from a large region in the district between the ninety-eighth and one hundredth meridians and the Canadian and Red Rivers (which district was not occupied by any settlement of the Choctaws or Chickasaws), and had begun to make use of this right by settling the Wichita and affiliated bands on a portion of the district, but the war had interrupted the further carrying on of this policy. It could, however, have gone on and filled the entire district with Indians, to the total exclusion of the Choctaws and Chickasaws, who had not, apparently, settled on any part of it, and whose right of settlement was necessarily limited to such parts of the district as were not occupied by the Indians placed there by the United States.

The various tribes within the Indian Territory had more land than they needed, and the United States wished to settle Indians from other parts of the country upon such surplus land. (Rept. of Sec. of Int., 1864, p. 177.)

The Choctaws and Chickasaws, being slaveholders, had, early in 1861, declared their intention to side with the South, and had subsequently made a treaty with the Confederate States and had made war upon the United States, their hostilities continuing until the suppression of the rebellion. (Reb. Rec., Vol. I, 682; Vol. III, 585; Vol. VIII, 1–33, 194–5, 206–8, 235–6, 534, 697–8, 709, 712–13, 715, 719–21; Vol. XIII, 297–304, 333–6, 820, 831, 859, 892–6, 944–948, 952, 955–6; Vol. XXII, pt. 1, 28–36, 457–462; pt. 2, 1118; Vol. XXXIV, pt. 1, 107–112, 849, 888, 1011–13; pt. 2, 875, 882, 959, 994, 1084; pt. 3, 746, 824; pt. 4, 694–5; Vol. XLI, pt. 1, 31–6; pt. 3, 982–4; pt. 4, 1086–96; Vol. XLVIII, pt. 1, 456; pt. 2, 911, 1302–4, 1311, 1315.)

By their rebellion the Choctaws and Chickasaws and other Indian allies of the Confederacy had put an end to all the treaty obligations of the United States toward them, and could only look to the mercy and generosity of the United States for the resumption of the payment of their annuities and the renewal of the relations previously existing. The United States, having put down their rebellion, had determined, as one of the conditions of the restoration of the *ante bellum* relations, to compel the slaveholding tribes to free all their slaves and to provide for them suitably out of the tribal property.

Under these circumstances the commissioners who met the rebellious tribes at Fort Smith in September, 1865, said:

> The following-named nations and tribes have, by their own acts, by making treaties with the enemies of the United States at the dates hereafter named, forfeited all right to annuities, lands, and protection by the United States.
>
> The different nations and tribes having made treaties with the rebel government are as follows, viz: * * * Choctaws and Chickasaws, July 12, 1861. * * *
>
> By these nations having entered into treaties with the so-called Confederate States, and the rebellion being now ended, they are left without any treaty whatever or treaty obligations for protection by the United States.
>
> Under the terms of the treaties with the United States, and the law of Congress of July 5, 1862, all these nations and tribes forfeited and lost all their rights to annuities and lands. (See. of Int. Rept., 1865, p. 482.)

The rebellion of the Choctaws and Chickasaws has an important bearing upon the treaty of 1866. The United States had a right to demand, and did demand, of them certain conditions before the former harmonious relations could be restored. These conditions were not oppressive or severe, but they called for some surrenders of rights previously enjoyed, surrenders which, but for the rebellion, the United States would have had no right to demand. It is a mistake to suppose that the Choctaw and Chickasaw treaty of 1866 put the tribes back where they were before their rebellion. It did so to a great extent, but it required of them conditions which they would

never have voluntarily agreed to had their old treaty rights not been forfeited.

The commissioners at the Fort Smith council declared that although it was purposed to treat the Indians liberally, yet new treaties must be made by each tribe, which treaties "must contain substantially the following stipulations:"

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.

5. A portion of the lands, hitherto owned and occupied by you, must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by Government, or such as may be fixed by the Government.

6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into

one consolidated government after the plan proposed by the Senate of the United States for organizing the Indian Territory.

7. No white person, except officers, agents, and employees of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band. (Report of Sec. of Interior, 1865, 482.)

No such treaties were actually entered into at that time, however, but a treaty of peace was made with each tribe (Rept. of Sec. of Int., 1865, p. 485–6; Deposition of Cyrus Bussey, Rec., 51), and it was agreed that each tribe should appoint commissioners to make the treaties demanded by the United States. Besides this, the commissioners proposed to the Choctaws and Chickasaws a treaty which, according to the Indian Commissioner's report, "was agreed upon" by the delegation from those tribes, and was to be approved by their councils and signed. (Rept. of Sec. of Int., 1865, p. 204.) This treaty, which was never ultimately executed, covered the seven stipulations, and also removed the restriction as to the purposes of the lease of 1865, as may be seen by the following comparison:

Stipulations.	*Proposed treaty.* (Rec., 452.)
1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.	ARTICLE 1. Peace and friendship are hereby firmly established between all the citizens of the United States and all the individuals comprising the aforesaid tribes; and all the friendly relations that existed

2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.

5. A portion of the lands, hitherto owned and occupied by you, must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties

between them before the rebellion shall be, and the same are hereby, renewed. [See also art. 8.]

ART. 2. The Choctaw and Chickasaw tribes of Indians do hereby bind themselves to use their influence, and whenever called upon by the Government to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians of the Territory, and with the United States.

ART. 3. The Choctaw and Chickasaw tribes of Indians hereby admit that the institution of slavery is abolished, and that slavery or involuntary servitude shall never hereafter exist in either tribe, except in punishment of crime, whereof the party shall have been duly convicted, and they promise and agree that measures shall be immediately taken by their respective national councils to properly provide for such emancipated slaves as may have belonged to the members of the respective tribes, such provision to be subject to the approval of the President of the United States.

ART. 4. The Choctaw and Chickasaw tribes of Indians hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere upon such terms as may

and approved by Government, or such as may be fixed by the Government.

hereafter be agreed upon by the respective parties and approved by the Government, and the Government may settle such friendly Indians on a portion of said Territory east of the ninety-eighth degree of west longitude, not necessary for the use of said Choctaw and Chickasaw tribes, as it may desire, not exceeding one-third of the whole remaining territory, for a fair and equitable consideration, to be fixed by the Government.

ART. 5. The Choctaw and Chickasaw tribes agree to a modification of the ninth article of the treaty concluded at the city of Washington the 22d day of June, A. D. 1855, by which they agree that all that portion of their common territory west of the ninety-eighth degree west longitude, leased to the United States, may be used for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate thereon, without exception or restriction as to the character of the tribes.

6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government after the plan proposed by the Senate

ART. 6. The Choctaw and Chickasaw tribes of Indians promise and agree to submit and recommend, at the first meeting of their respective general councils, the adoption of the plan proposed in the Senate bill 459,

of the United States for organizing the Indian Territory.

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7. No white person, except officers, agents, and employees of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band.

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nesty of all past offenses, either against their government or the Government of the United States, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who may have remained friendly and loyal to the United States, but they shall all enjoy equal privileges with other members of said tribes.

ART. 9. The United States hereby promise and agree to restore the Choctaw and Chickasaw tribes of Indians to all their rights and privileges in lands and annuities, that they were possessed of and entitled to, and they shall be applicable to the same objects as existed at the breaking out of the rebellion, except such part or parts of annuities and moneys as have been expended by the President in providing for the relief of destitute Indians, who were reduced to want on account of their friendship to the Government of the United States, which shall not be refunded.

ART. 10. It is hereby mutually agreed that all of the provisions of the treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw tribes of Indians not inconsistent with the foregoing articles are hereby adopted and made a part of this instrument.

ART. 11. The Choctaw and Chickasaw tribes of Indians expressly agree that any amendment to this treaty, which the Senate of the United States may make, shall be taken and held as a part of the same, and as binding in every respect as if it had, after being made, been formally submitted to and ratified by such parties.

In the proposed treaty the only provision which affected the leased district was the removal of all restriction as to the tribes whom the Government might settle there, and the Choctaws and Chickasaws were to be required to agree to this without any compensation. Either it was thought that the removal of the restriction was a matter of indifference to the Choctaws and Chickasaws, or else it was demanded by the United States, as compliance with the seven stipulations was demanded, in consideration of the pardon accorded to the Indians for their rebellion. At all events, the removal of the restrictions as to the tribes who could be settled in the leased district was something outside the seven stipulations, the fifth of which was fully and completely embodied in article 4, which even contains some of the precise language used in that stipulation. The terms of the fifth stipulation do not apply to the case of the leased district but to lands "hitherto owned and occupied by" the Indians. The only land "hitherto occupied by" the Choctaws and Chickasaws was east of the ninety-eighth meridian, and there is absolutely no evidence of any real occupation by those tribes west of that line. The "leased district," too,

could hardly have been properly described as "owned" by the Choctaws and Chickasaws, it being subject to a perpetual lease for the *permanent* settlement of the Wichitas and certain other Indians thereon, a disposition of the district which might conceivably involve its total occupation, to the exclusion of the Choctaws and Chickasaws in case they should not have availed themselves of their right of settlement before the district had been wholly settled by others. Certainly it was not owned in the same sense in which the Choctaw and Chickasaw districts were owned by those tribes. Moreover, the "leased district" did not require to "be set apart for friendly tribes," as it had been so set apart and partly occupied ever since 1855.

The proposed treaty was approved by the Choctaw and Chickasaw commissioners, but they had not been empowered to do more than sign a treaty of peace, so that it remained unexecuted, and the next year, when the Indian commissioners came to Washington, a new treaty was executed on April 28, 1866, and proclaimed July 10, 1866 (14 Stats., 769). That treaty not merely covered the ground of the proposed treaty much more elaborately and in detail, but also provided for several matters not covered by the proposed treaty, such as grants of rights of way to railroad companies and subscriptions to their stock, payable in land; Federal legislation for the protection of personal and property rights; the survey of the Choctaw and Chickasaw lands, and their division in severalty, including various provisions for the selection of land by individuals; post-offices and the carriage of

mail; capitalization of annuities and funds; and the claims of loyal Indians and the damages due them.

The stipulations announced at the Fort Smith council were embodied in this treaty of 1866, as follows:

The first and second in Article I;

The third in Articles II, III, and IV;

The fourth in Article II;

The fifth in Articles XXX, XXXI, and XXXVII;

The sixth in Article VIII;

The seventh in Article XLIII.

That the stipulations were so embodied will be readily seen by the following comparison:

Stipulations.	*Treaty of 1866.*
1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.	ARTICLE I. Permanent peace and friendship are hereby established between the United States and said nations; and the Choctaws and Chickasaws do hereby bind themselves respectively to use their influence and to make every exertion to induce Indians of the plains to maintain peaceful relations with each other, with other Indians, and with the United States.
2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.	
4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.	ART. II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with
3. The institution of slavery, which has existed among several of the tribes, must be forthwith	

abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

laws applicable to all members of the particular nation, shall ever exist in said nations.

ART. III. * * * The said sum [$300,000] shall be invested and held by the United States, at an interest not less than five per cent, in trust for said nations, until the legislatures of the Choctaw and Chickasaw nations respectively shall have made such laws, rules and regulations, as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the

said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be

upon the same footing as other citizens of the United States, in said nations.

ART. IV. The said nations further agree that all negroes, not otherwise disqualified or disabled, shall be competent witnesses in all civil and criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected against injury; and they further agree, that while the said freedmen, now in the Choctaw and Chickasaw nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupant, it being understood that in the event of

6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States for organizing the Indian Territory.

5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

the making of the laws, rules, and regulations aforesaid the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid.

ART. VIII. [This article covers the details of a consolidated government for the Indian Territory, a matter not relevant to the issues involved in this case.]

ART. XXX. The Choctaw and Chickasaw nations will receive into their respective districts east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw nation, civilized Indians from tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same laws and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and in other moneys, and in the public domain should the same

or the proceeds thereof be divided per capita among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made, as aforesaid, by said Choctaws and Chickasaws; and the Choctaw and Chickasaw nations pledge themselves to treat the said Kansas Indians in all respects with kindness and forbearance, aiding them in good faith to establish themselves in their new homes, and to respect all their customs and usages not inconsistent with the constitution and laws of the Choctaw and Chickasaw nations, respectively. In making selections after the advent of the Indians and the actual occupancy of the land in said nation, such occupancy shall have the same effect in their behalf as the occupancies of Choctaws and Chickasaws.

ART. XXXI. And whereas some time must necessarily elapse before the surveys, maps, and selections herein provided for can be completed so as to permit the said Kansas Indians to make their selections in their order, during which time the United States may desire to remove the said Indians from their present abiding places, it is hereby

agreed that the said Indians may at once come into the Choctaw and Chickasaw nations, settling themselves temporarily as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

ART. XXXVII. In consideration of the right of selection hereinbefore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw nations, out of the funds of Indians removing into said nations, respectively, under the provisions of this treaty, such sum as may be fixed by the legislatures of said nations, not exceeding one dollar per acre, to be divided between the said nations in the proportion of one-fourth to the Chickasaw Nation and three-fourths to the Choctaw Nation, with the understanding that at the expiration of twelve months the actual number of said immigrating Indians shall be ascertained and the amount paid that may be actually due at the rate aforesaid, and should still further immigrations take place from among said Kansas Indians, still further payments shall be made accordingly from time to time.

7. No white person, except officers, agents, and employees of the Government, or of any

ART. XLIII. The United States promise and agree that no white person, except officers, agents,

internal improvement authorized by the Government, will be permitted to reside in the Territory, unless formally incorporated with some tribe, according to the usages of the band.

and employees of the Government, and of any internal improvement company, or persons traveling through, or temporarily sojourning in, the said nations, or either of them, shall be permitted to go into said Territory, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs, or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or to be taken to interfere with or invalidate any action which has heretofore been had in this connection by either of the said nations.

The provisions of this treaty of 1866 are, as already stated, much more detailed than those of the treaty proposed in 1865, but it is evident that all the seven stipulations are provided for in the sections cited above. The words of Article XXX, "civilized Indians from tribes known by the general name of the Kansas Indians, being

Indians north of the Indian Territory," manifestly correspond to the words of the fifth stipulation, "the friendly tribes now in Kansas and elsewhere." In spite of this fact, however, the court below has held that Articles XXX, XXI, and XXVII were not intended to carry out the fifth stipulation, and the reasons advanced in support of this view will have to be considered in connection with the next point in the argument.

(2.)

The cession of the "leased district" in 1866 was absolute. (See the seventh assignment of error.)

The treaty proposed at Fort Smith in 1865 contained, as has been already seen, one provision which was outside the scope of the seven stipulations, because it related to a matter peculiar to the Choctaws and Chickasaws. This was a provision for removing the restriction as to the Indians who could be settled on the "leased district." Similarly, the treaty of 1866 contained the following provision:

> ARTICLE III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district.

In comparing the above provisions of the treaty of 1866 with the treaty proposed by the commissioners in 1865, it will be readily seen that the main difference is that, instead of removing the restriction as to the Indians who could be settled on the leased district—this change in the terms of the lease being made without any new

consideration other than the general resumption of the old treaty relations—the Choctaws and Chickasaws sold outright all their remaining interest in that district, in consideration of $300,000, which sum was to be treated as a special guaranty fund to secure compliance with the stipulation as to a suitable provision for the freedmen. The reason for this new arrangement effected by the treaty of 1866 may be gathered from the peculiar circumstances of the Choctaws and Chickasaws at that time.

From the Rebellion Records, the transactions at the Fort Smith council, and the treaties subsequently made, it appears that the only slaveholding tribes, and the only ones whose treaties with the Confederacy had been really made by the duly constituted authorities of the tribes, and who had actively participated in the rebellion, were the Choctaws and Chickasaws, Creeks, Cherokees, and Seminoles, so that it was to these tribes alone that the third, fourth, and fifth stipulations applied. Of these stipulations the third was by far the most onerous, as it involved not merely the abolition of slavery, but the "incorporation into the tribes" of all the emancipated slaves "on an equal footing with the original members," or a suitable and equivalent provision for them; in other words, either a gift to the former slaves of a share in the tribal property or else some equivalent provision out of the tribal funds.

This compulsory endowment of the former slaves was no small matter, and it was undoubtedly intended as a punishment for the Indians' participation in the rebellion.

To the Choctaws and Chickasaws it was especially onerous, not only because they seem to have had, either actually or proportionately, the most slaves, but because they were more deeply imbued with the slaveholding sentiment than were the other tribes. Their alliance with the Confederacy was avowedly entered into in consequence of their possession of slave property, which they wished to retain. The action of their legislatures shows an intense aversion to admitting their slaves to an equality with themselves as members of their tribes. In this respect, therefore, the Choctaws and Chickasaws differed from the three other tribes, and another point of difference was that they had "leased" to the United States a portion of the land originally granted them. None of the other tribes had done this, and as the United States, in 1865–66, wished to remove some, at least, of the restrictions upon its use of the leased district, it was necessary that the Choctaw and Chickasaw treaty should contain at least one provision not common to the others.

Judging by the provisions ultimately made in the treaty of 1866, the chief objection of the Choctaws and Chickasaws to the treaty proposed in 1865 would seem to have concerned the provision for the emancipated slaves. By the proposed treaty the former slaves, whether admitted to the tribal rights or not, would have to be provided for out of the tribal property, and to the extent of that provision the tribal property, or at least the Indians' share in it, would be diminished. The only way for the Indians to avoid surrendering either a part of their income, or, what would come to the same thing, a part of their income-producing assets, was to realize on

certain nonincome-producing assets, viz, their remaining rights in the leased district, and so to raise the means of providing for their former slaves.

This was done accordingly, the United States taking advantage, and very properly, for reasons which will be considered below, of its control over the fund so raised, to insure the fair treatment of the emancipated slaves, and that the requisite provision for them should ultimately be made. This double object, the turning of a hitherto inactive asset into cash and the disposition of the money so obtained, was therefore provided for in Article III of the treaty of 1866.

This article relates to two matters. First, the cession of the leased district in consideration of $300,000, and, secondly, the disposition of the fund. The first matter is disposed of in a very few words, viz:

> The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district.

The rest of the section has absolutely nothing to do with this cession whatever, but concerns exclusively the disposition of the proceeds. The language of the cession is simple, and clearly imports an absolute conveyance of whatever remaining interest the Choctaws and Chickasaws had in the land. The United States, as the paramount power, already possessed the right of sovereignty, and also, under the treaties of 1830 and 1855, the reversion of the land itself, in case the Indians became extinct or abandoned it. Furthermore, by the treaty of 1855, the United States had acquired, in consideration of

$800,000, the right to permanently settle the Wichita and other tribes upon the land, except the tribes of New Mexico and certain others. All that remained to be acquired by the United States was the right to use the land for any purposes it might see fit, and to exclude the Choctaws and Chickasaws from settling upon it. When those rights were acquired the United States became possessed, as against the Choctaws and Chickasaws, of an absolute and indefeasible title to the land, without regard to the use that was made of it, and this was what the cession of 1866 brought about.

The reason why the United States retained a measure of control over the disposition of the $300,000 was because it was necessary to insure the making of some adequate provision for the freedmen in accordance with the third stipulation of the Fort Smith council, the Choctaws and Chickasaws not having made this provision, as the other slaveholding tribes had done. The Seminole treaty, besides prohibiting slavery, provided:

> And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such others of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens. (14 Stats., 756.)

The words "who have no interest or property in the soil" make it clear that "all the rights of native citizens" include rights in the tribal property as well as civil rights. The Creek treaty expressly stated that the freedmen

"shall have and enjoy all the rights and privileges of native citizens, *including an equal interest in the soil and national funds.*" (14 Stats., 786.) While the Cherokee treaty was not so explicit in its language, there can be no doubt that the words "shall have all the rights of native Cherokees" (14 Stats., 801) referred to the property rights of the members of the tribe, and not merely to their civil rights.

These treaty provisions, being "the law of the land" for the several tribes as well as for the United States, effected the participation of the freedmen in the property rights of their former masters without the need of any action of the tribal legislatures. The Choctaws and Chickasaws, however, merely agreed in their treaty that the freedmen should have certain civil rights, not including that of citizenship, and that while they remained in the Choctaw and Chickasaw nations they should, unless they supported themselves by hiring, "be entitled to as much land as they may cultivate for the support of themselves and families." (14 Stats., 770.) Any further provision in compliance with the third stipulation required the action of the Choctaw and Chickasaw legislatures, as Article III clearly shows. In point of fact, it is matter of history that these tribes did not wish to admit their freedmen to a share in the tribal property, but wished to get rid of them, and it was absolutely necessary for the United States to make sure that whatever course was pursued the freedmen should be fairly treated.

In adopting the course provided for in Article III, the United States did not treat the Choctaws and Chickasaws

any less favorably than it did the other slaveholding tribes, but rather the reverse, since the former were only required to give their freedmen 40 acres apiece, or, in default of that, to forfeit their respective shares of the $300,000, while the latter were required to admit their freedmen to equal ownership with themselves in the tribal property.

The facts as to the actual disposition of the $300,000 are that the Choctaws have now received all of the $225,000 promised them, and the Chickasaws a portion of their $75,000. They could at any time receive the balance if they would consent to make provision for their freedmen. The payments were made under different appropriation acts, as follows:

Article XLVI modified to some extent the provisions of Article III in regard to the control retained by the United States over the $300,000, and provided that $200,000 should be advanced to the Choctaws and Chickasaws on account of the $300,000, and the moneys to be paid under Articles XXX and XXXVI for land in the Choctaw and Chickasaw districts to be occupied by the Kansas Indians, the said $200,000 to be repaid out of either of the said funds or any other moneys of the Choctaws and Chickasaws. Accordingly this was done under the act of July 26, 1866 (14 Stats., 259). The same act appropriated $15,000, "or so much thereof as may become due to the Choctaws and Chickasaws," for interest at 5 per cent under Articles III and XLVI. So far as the first year's interest was concerned only $5,000, the interest on the balance of $100,000, was due, but the full amount was paid. The act of April 10,

1869, § 1 (16 Stats., 39), made a second appropriation of $15,000 for interest, stated to have been due August 8, 1868, although this exceeded the interest then due on the balance of $100,000. The act of May 17, 1882, § 1 (22 Stats., 72), appropriated $10,000 out of the fund of $300,000 for the education of the freedmen, provided that, if before the actual disbursal of the money either the Choctaws or the Chickasaws passed the laws called for by Article III, their proportion of the $10,000 should be paid to the tribe directly. This proviso operated as an extension of the period, viz, two years after the ratification of the treaty, within which these laws should have been passed, if the Choctaws and Chickasaws were to have the benefit of the fund of $300,000. Finally the Choctaws having, on May 21, 1883, enacted the requisite laws in regard to their freedmen (Choc. Laws, 1894, p. 335), their delay in so doing was waived by the act of March 3, 1885 (23 Stats., 366), and the balance due them of the sum of $225,000, their proportion of the $300,000, was ordered to be placed to their credit on the books of the Treasury. This balance ($52,125) was computed as follows (Rec., 263):

Balance due Choctaws after payment of $150,000 in 1866		$75,000
Deduct excess of interest for first year paid under appropriation of 1866 ($11,250—$3,750=$7,500)		7,500
Balance due after deduction		67,500
Deduct excess of interest for second year paid under appropriation of 1869 ($11,250—$3,375=$7,875)	$7,875	
Deduct appropriation of 1882	7,500	
		15,375
Balance of principal due		52,125

Interest was paid for the first two years only, because Article III provided that unless the Choctaws and Chickasaws enacted the necessary laws within two years the money should not be paid to them. They not having done so, "the residue" referred to in Article XLVI became "affected by" Article III, and hence no further interest was required to be paid upon it. In consequence of the Choctaws' ultimate, though late, compliance with Article III, Congress in 1885 waived the condition as to compliance within two years, as far as payment of the principal was concerned, and paid over the balance then due, but Congress did not waive its right to withhold the interest.

The payments to the Chickasaws on account of principal aggregate $57,625, as follows:

Paid under Article XLVI and appropriation of 1866	$50,000
Excess of interest for first year, paid under appropriation of 1866	2,500
Excess of interest for second year, paid under appropriation of 1869	2,625
	55,125
Add amount expended under appropriation of 1882, for education, etc., of freedmen	2,500
Total expended	57,625

This leaves $17,375 unpaid on account of the Chickasaws' share of the $300,000, but as the Chickasaws have practically annulled the law which they enacted in regard to their freedmen, they are not yet entitled even to the $55,125 which they have received. This, however, is a matter that does not strictly enter into the present case.

When, therefore, the court below says that it must inquire how it came about that the Choctaws and Chickasaws "should, for a consideration of $300,000, part with all interest in nearly 8,000,000 acres of land, worth about $8,000,000 (according to the value put by the grantee at the time upon land adjoining the ceded territory), and at the same time bargain to give from other possessions tracts of more than 300,000 acres to get the money, or failing to yield these tracts to third persons, who by the arrangement were to become the beneficiaries, leave themselves in position to surrender indefinitely land enough for 8,000 people to cultivate, besides conferring on them other rights"[1] (Rec., 406), the answer of the United States to this inquiry is, first, that it had previously acquired, by what was termed a lease, for a consideration which was satisfactory to the Choctaws and

[1] This last clause, "leave themselves in position to surrender indefinitely land enough for 8,000 people to cultivate, besides conferring on them other rights," is rather obscure. It is evidently intended to express, however, the consequences of the possible failure of the Choctaws and Chickasaws to "yield these tracts to third persons," i. e., to provide for their freedmen, as required by the third stipulation, out of their land east of the ninety-eighth meridian, and hence, as the only possible consequence of such failure would be a surrender of the leased district without ultimately receiving the $300,000, this must be what is referred to; though why the "leased district" should be described as "land enough for 8,000 people to cultivate" does not appear. It can not be that the court below thought that the Government intended to use the "leased district" for the settlement of the *circa* 8,000 freedmen of the Choctaws and Chickasaws, in case they were not provided for by the tribes themselves, because the view of the court below is that the Government intended and agreed to use it exclusively for "the friendly tribes in Kansas and elsewhere."

Chickasaws, the right to permanently use the whole district for Indian settlement, subject only to a right of settlement on the part of the Choctaws and Chickasaws, which they had never made use of, so that what the latter parted with in 1866 was not "all interest" in the district, but a mere right of settlement, the value of which was problematical, since it could only apply to such part of the district as might be unoccupied when they should seek to avail themselves of the right, and would be practically extinguished if the district were wholly occupied before they attempted to settle therein; and, secondly, that all the slaveholding tribes were required to do as much for their freedmen as were the Choctaws and Chickasaws, if not more, and that the control retained over the $300,000 was necessary in order to insure due compliance with what was required.

That the Choctaws and Chickasaws were required, as the other tribes were, to provide for their freedmen, was one of the conditions of their restoration to the treaty-rights which they had forfeited by their rebellion; it was in the nature of a punishment for the offenses which they had committed. It can not, when rightly considered, be regarded as an unjust requirement, nor as indicating in any way that the cession of the "leased district" was in trust and not absolute. It had, in fact, nothing whatever to do with the character of that cession, and the propriety of treating the consideration for the cession as a guaranty fund, to insure compliance with the requirement as to the freedmen, was the same whether the cession was absolute or in trust. No argument as to the

character of the cession can possibly be drawn from the disposition of the proceeds.

That $1,100,000 was an insufficient consideration for an absolute cession of all interest in the district between the ninety-eighth and one hundredth meridians and the Canadian and Red rivers, so that a trust must be presumed on account of such insufficiency, the court below does not state. All that it says as to the consideration is the suggestion that a cession of all interest in that district for so small a sum as $300,000 would warrant an inquiry into the object of the parties. In speaking of a cession of "all interest" for $300,000, the court seems to have forgotten about the $800,000 paid eleven years before, and to have regarded $300,000 as the sole consideration. To maintain, therefore, as the United States does maintain, that the sum of $1,100,000 (i. e., $800,000 for the partial interest acquired in 1855 and $300,000 for all the interest that remained in the Choctaws and Chickasaws) is not so small as to raise a presumption that a cession even of nearly 8,000,000 acres, absolute on its face, was really in trust for a particular use of the land, does not contravene anything that is stated in the opinion of the court below or can fairly be implied from that opinion.

As to the sum of $1,100,000, the only question that can arise is whether the parties regarded it as reasonable at the time. The sum of $800,000, paid for the so-called "lease" in 1855, was fixed by the Choctaws and Chickasaws themselves. The Government refused to pay $200,000 in addition for the quitclaim, but as regards the

lease it agreed to the Indians' terms without deduction. (Sen. Mis. Doc. No. 31, Thirty-fourth Congress, first session, pp. 63–64.) There can therefore be no question as to the reasonableness of this sum at the time when it was agreed upon. As to the $300,000, there is no evidence to show that it was inadequate for a complete extinguishment of the rights which the Choctaws and Chickasaws had retained in the "leased district," rights which they had made no use of in the course of eleven years, and which, if not soon made use of (and there is no indication that they would have been), were likely to be extinguished altogether by the complete occupation of the district by other Indians under the terms of the lease.

The reasons which the court below gives for holding that the cession of 1866 was not absolute, but in trust, are not succinctly stated in the opinion, but if the latter be carefully studied they will be found to be the following:

1. That the Choctaws and Chickasaws understood the cession as a trust, and that the treaty must be construed as they understood it. (Rec., 406–410.)

2. That Congress declared, in 1891, that the cession was in trust. (Rec., 410–414.)

3. That "so many things" were annexed to the cession as to involve contradiction and inequality unless the cession be treated as in trust. (Rec., 414–417.)

4. That the cession is the only provision in the treaty which embodies the fifth stipulation presented at the Fort Smith council, which stipulation contemplates a cession for a particular purpose. (Rec., 417–420.)

5. That an absolute cession involves an abandonment of the purpose of the lease, and violates the stipulations and policy of the Government. (Rec., 420, 421.)

6. That the Government about this same time acquired land from the Cherokees, Creeks, and Seminoles in trust for Indian settlement. (Rec., 421–424.)

7. That it has repeatedly been admitted by officers of the United States that the cession was in trust. (Rec., 424–427.)

These reasons will now be discussed in their order.

(a.)

The first reason advanced by the court in support of its conclusion is that the Choctaws and Chickasaws understood the cession as a trust, and that the treaty must be construed as they understood it. The opinion says:

> The question resolves itself at last into the understanding of the parties, and especially the understanding of the Indians in respect to the meaning of an uncertain agreement arising out of the transfer of an immense domain for a nominal consideration, the incorporation of a large body of Indians as well as freedmen into the body politic of the plaintiff nations, and the receipt by them of a small sum stipulated to be paid for uses not necessarily relating to the advantage of the parties, but for those whom the treaty provided were to be incorporated. (Rec., 410.)

The expression "a nominal consideration" shows that the learned judge had in mind only the $300,000 mentioned in the treaty of 1866, and overlooked the $800,000 paid under the treaty of 1855. The error of this oversight has already been discussed and need not be again

adverted to. The references to the agreement as "uncertain" and to the consideration as one "not necessarily relating to the advantage of the parties, but for those whom the treaty provided were to be incorporated," i. e., the freedmen, will be discussed below. The important words to be now considered are "the understanding of the Indians." Now, the learned judge has, it is submitted, simply *assumed* that in 1866 the Indians understood the cession to be in trust, without any real proof of it whatever. That in 1890 they claimed that the cession had been in trust, and that they have so claimed ever since, is true, but that those who were living in 1866, twenty-four years before, believed so *then* is a mere matter of assumption or inference. If the majority of the court below have made up their minds, upon the evidence, that the cession was intended to be in trust, then they may be justified in supposing that the Indians so believed, but the existence of such a belief can not be assumed at the start and then this assumption treated as a substantial reason for holding that the cession was in trust.

It is submitted that neither the record nor any public document discloses any statement of either the Choctaws or the Chickasaws prior to 1890 to the effect that the cession of 1866 was in trust. In point of fact only three statements of theirs in regard to that cession can be found which appear to have been made before that date. The first is the Choctaw act of November 20, 1867, in regard to certain claims under the treaty of 1866, the third section of which speaks of "the forced sale of the 'leased district,' lying west of ninety-eighth degree west longi-

tude, for about 2½ cents per acre, for objects of negro colonization upon their borders." (Choc. Laws, 1869, p. 478.) This assertion of the supposed object of the cession is wholly inconsistent with their present claim, which is that the "leased district" was ceded in trust for Indian settlement exclusively, so that in case any of the land came into the possession of a negro, or any other person than one belonging to the friendly tribes, who, in 1866, were "in Kansas or elsewhere," the trust would be violated. Moreover, there was absolutely nothing on which to base the idea that the "leased district" was sold "for objects of negro colonization." The United States never proposed to buy, for any such purpose, either the "leased district" or any other land in which the Choctaws or Chickasaws had any interest, nor did the latter ever offer to part with any land for such a purpose. It was provided that they should either give their freedmen some of their own land (not colonizing them, but allowing them to remain permanently where they were), or else that the United States should remove them and provide for them out of the consideration given for the cession of all the remaining interest of the Choctaws and Chickasaws in the "leased district," but no use of that district for the colonization of either these freedmen or any other negroes had ever been suggested, nor has it apparently ever been suggested since that time. This statement, having nothing to support it, may, therefore, be disregarded. If any importance be attached to it, it should be observed that it says nothing about any trust, and distinctly controverts the present claim of the Choctaws.

The next statement is found in the Chickasaw protest of 1872, which contains these words:

> It is believed that the only rights given up by the treaty of 1866 are the right to hold slaves, the right to the leased district, so called, between the ninety-eighth and one hundredth meridians of west longitude, upon certain conditions therein set forth, and the unrestricted right of self-government. * * * (House Ex. Doc. No. 141, Forty-second Congress, third session, p. 3.)

The protest here quoted from was directed against a bill, then before Congress, to provide a territorial government for the Indian Territory, and thus to deprive the Chickasaws of the right of separate self-government secured to them by treaty. Such a protest would certainly not minimize the rights of the Chickasaws, but would present them as fully as possible, so that whatever rights the Chickasaws claimed to have in the leased district would be sure to be set out in full. What was said was that "the right to the leased district" (i. e., whatever right the Chickasaws had therein after it had been leased) was "given up by the treaty of 1866," "upon certain conditions *therein* set forth," i. e., set forth in that treaty. The only conditions "therein set forth" in connection with the cession of the leased district did not concern the character of the cession, but only the disposition of the sum of $300,000, the consideration therefor. What has been done in regard to this sum has already been shown, but that does not in any way affect the absoluteness of the cession. Hence this Chickasaw protest clearly concedes that the cession was an absolute one.

The third statement occurs in a memorial of the Chickasaws to the President in regard to their freedmen. It is not dated, but as it accompanies another memorial, dated October 4, 1887, it was probably made about the same time. It says:

> Article III of the treaty of April 28, 1866, contains the following provisions:
>
> (1) The Choctaws and Chickasaws agreed to sell and cede to the United States, for the sum of $300,000, the territory west of the ninety-eighth meridian, known as the "leased district." (Senate Ex. Doc. No. 166, Fiftieth Congress, first session, p. 11.)

Precisely the same words are used on page 17 of the same document, in a statement dated April 22, 1884, made by Halbert E. Paine, then and now the attorney for the Chickasaws.

This statement of the Chickasaws and of their attorney does not quote the precise words of the treaty, but is obviously intended to give the substance of the provision referred to, according to the Chickasaws' idea of its tenor and effect. They say "sell and cede" (an expression even more forcible, if anything, than the single word "cede" to denote an absolute transfer of all property rights), and they do not make the slightest reference to any trust or condition whatever affecting the title of the United States to the district so sold and ceded. The absence of any such reference is as significant as is the use of the unequivocal words "sell and cede."

In the absence, then, of any statement on the part of

the Choctaws or Chickasaws contemporaneous with the treaty of 1866, or less than twenty-four years subsequent thereto, that the cession of the leased district was in trust for Indian settlement, it is clear that the learned judge of the court below must have simply assumed that they so believed at the time the cession was made, unless it can be shown that the persons acting in behalf of the United States stated, at or before that time, that the cession was to be in trust.

The Choctaws and Chickasaws were told, in 1865, that a portion of the lands, hitherto owned and occupied by them, must be set apart for the friendly tribes in Kansas or elsewhere, upon terms to be agreed upon; but article 4 of the treaty proposed in 1865 shows that this referred to lands east of the "leased district," no change being suggested as to the latter, except the removal, without considerations, of one of the conditions of the lease. The provisions of article 4 of the treaty proposed in 1865 are substantially contained in Articles XXX, XXXI, and XXXVII of the treaty of 1866, where it is arranged that such lands as the Choctaws and Chickasaws were to part with, east of the "leased district," were to go exclusively for Indian settlement by members of tribes such as the fifth stipulation referred to, while the cession of the "leased district" (or, strictly speaking, of the remaining interest of the "lessors" therein) appears to be a wholly distinct transaction, for which a distinct consideration was to be paid. There is therefore no evidence that the Choctaws and Chickasaws were told, before or at the time the treaty of 1866 was made, that the cession

of the "leased district," though absolute on its face, was really in trust for Indian settlement, nor anything to warrant the assumption that they so understood.

As the "leased district" had originally been "leased" for Indian settlement, and part of it had already been used for that purpose, there was reason to expect, in 1866, that this use of it would continue for some time; but the evidence discloses no reason whatever for any belief, then or subsequently, that the United States did not possess an absolute title to the district, as against the Choctaws and Chickasaws, whatever might be its title as regards the Indians whom it settled in the district.

The court below strives to justify its assumption that the Choctaws and Chickasaws believed in 1866 that the cession was in trust for Indian settlement (or, perhaps, its inference of such a belief from the fact that these Indians *now* claim that the cession was of that nature) by laying great stress on the words of Mr. Justice McLean in *Worcester* v. *Georgia* (6 Pet., 515, 582), when he said that—

> the language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

The requirement that words should be considered as used only in "their plain import, as connected with the

tenor of the treaty," is not peculiar to Indian treaties, being manifestly nothing but a statement of the general rule that each part of an instrument must be construed with reference to the whole. Moreover, the statement that "the language used in treaties with the Indians should never be construed to their prejudice," but as "understood by this unlettered people," is merely an application to a particular class of documents of the general rule that the intention of the parties must prevail, the same rule which, as applied to the Quapaw treaty of 1818 and the Choctaw treaty of 1820, excludes the possibility of any cession of land west of the one hundredth meridian having been made by either treaty. In reaching the intention of the parties it must be borne in mind, in such a case as that which was presented in *Worcester* v. *Georgia*, that one of the parties was unlettered—unaccustomed to precision of statement and ignorant of technical or formal terms of law—and the language used must be interpreted as such a party would naturally have understood it.

This rule is obviously one of relative application. In the case of the early Cherokee treaties, which were before the court in *Worcester* v. *Georgia*, the rule needed to be applied to the fullest extent, the Cherokees being undoubtedly an "unlettered people" at the time the treaties were made. In *Choctaw Nation* v. *United States* (119 U. S., 1), involving the Choctaw and Chickasaw treaty of 1855, the rule was referred to by the court, but it was obviously not at all as applicable to the comparatively educated Choctaws and Chickasaws of 1855 as to the

totally illiterate Cherokees of 1800. In fact, the rule, as applicable to that case, took this form:

> The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

In the case of the treaty of 1866 the parties may fairly be said to have dealt very much on an equal footing. It is true that the recent treason and rebellion of the Choctaws and Chickasaws put them at the mercy of the United States, and entitled it to demand of the Indians concessions which would not have otherwise been asked; but the Indians were in a position to understand thoroughly every feature of the treaty and to protect themselves against the possibility of even an unintentional imposition. They had long ceased to be an "unlettered people," although one of the Chickasaw commissioners seems to have been unable to write his name. A Choctaw statute of 1842 relates to public schools, and one of 1846 forbids the appointment or election of any person as a judge unless he can read the English or Choctaw language. In the Laws of the Choctaw Nation (edition of 1869, p. 451) the very next law after that approving the treaty of 1866 is one requiring the district school trustees, under the direction of the superintendent trustee, to establish and maintain a neighborhood school in each neighborhood where there are children of proper age to attend the school.

As early as 1834 the general council of the Choctaw Nation enacted written laws in substantially the same form as that employed by Congress and the State legislatures, and the subject-matter of even the earliest of these statutes is the same as that with which civilized legislatures have always had to deal, viz, prohibition of the introduction of ardent spirits, theft, wills, infanticide, fences, injuries by stock, marriage, divorce, slavery, forest fires, etc. This general council appears to have acted from the first under a written constitution, which was superseded by another in 1842, this being superseded in its turn by the more elaborate constitution of 1850, which, with its declaration of rights, its careful separation of the executive, legislative, and judicial departments of the government, and its detailed provisions for each department, was certainly fitted to be the fundamental law of a civilized community. (Choc. Const. and Laws, ed. of 1852.)

In 1860 another and still more elaborate constitution was adopted by the Choctaws, a constitution which, except in a few details peculiar to an Indian nation, did not in the main differ from those then in force in the several States of the Union. (Choc. Laws, ed. of 1869.)

The Chickasaws were, in 1866, in much the same condition as the Choctaws, and entitled to be regarded as a civilized community, as appears from their constitution and laws, edition of 1867. The Secretary of the Interior's report for 1865 (pp. 207–8, 440–1, 465) describes both these tribes as well advanced in education and civilization.

Moreover, whatever was the precise condition of the Choctaws and Chickasaws in 1866 in regard to civilization, they were represented in the negotiations preliminary to the treaty of 1866 by the eminent lawyer John H. B. Latrobe, of Baltimore, who subscribed as witness to the treaty. In his letter of April 4, 1866, to the Indian Commissioner, Mr. Latrobe said:

> Having gathered from the Choctaw and Chickasaw delegates the ideas of the Secretary, I have, with a view to something more definite than can be reached by general conversation, taken the office draft of a treaty as a basis and attempted to make it express, with here and there an alteration, the wishes of the parties. At all events, the points of difference can now be narrowed down, until, I trust and believe, they will disappear. Thinking I may, perhaps, be useful to our friends now, and perhaps facilitate your labors in this connection, I will be happy, if you find it altogether proper and agreeable, to call on you at your office at any hour you may name on any evening, or should your convenience be promoted it will give me great pleasure to see you at your house.
>
> I think I see, now, an early agreement on all the knotty points. (Rec., 189.)

With Mr. Latrobe as their counsel it is impossible that the Choctaw and Chickasaw delegates should not have thoroughly understood just what the provisions of the treaty covered, especially as those provisions had been the subject of much discussion before an agreement was finally reached. It is therefore absolutely preposterous for the claimants to seek to put forced constructions upon the treaty, or to change the plain language of its terms,

on the ground that as "an unlettered people" they can not be supposed to have understood all that it meant. They could with precisely the same justice plead that they should not be bound by any of the proceedings in this court on the ground that they are not all of them trained lawyers, but have to appear by counsel.

Besides, even if the claimants were in a position to claim the full benefit of Mr. Justice McLean's words in *Worcester* v. *Georgia* in the construction of the treaty of 1866, it would not support their contention. The doctrine applies where "words are made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty." In the present case the vital words are "hereby cede to the United States," and the most "extended meaning" that they can have, viz, as divesting the claimants of all estate, right, title, or interest whatever in the ceded district, is merely the same as "their plain import as connected with the tenor of the treaty." There is absolutely nothing in the treaty, from one end to the other, nor in any of the circumstances under which it was made, nor in any contemporaneous statements or transactions, to give these words any other meaning. The facts were that the claimants had previously, for a substantial consideration, parted with most of their interest in the country between 98° and 100°; that they were now called upon to make provision for their former slaves; and that the only means of so doing without diminishing either their regular annuities or the reservations which they actually occupied was by disposing of their remaining interest in the previously "leased" district. That interest was scarcely

susceptible of being divided in any way except territorially, and the words used exclude the idea of any such division, while there is no record of any proposition to divide it in any way whatever. The most natural disposition to make of this interest was to sell the whole of it outright for what it would bring, and there is no reason to suppose that the United States would have consented to purchase less than the whole. The words of grant, taken by themselves, can mean nothing else than a cession of the entire interest, and there is absolutely nothing in the circumstances under which they were used to warrant the theory that the cession was intended to be anything less than entire.

(b.)

The second reason of the court below for holding that the "leased district" was ceded in trust is that Congress so stated in 1891. In the argument before the court below the counsel for the Choctaws and Chickasaws went much beyond this, contending that the statement in the act of March 3, 1891, § 15 (26 Stats., 1025), that the Cheyenne and Arapahoe Reservation, a portion of the "leased district," adjoining the Wichita Reservation, had been "ceded in trust by article three of the treaty" of 1866, was conclusive as a legislative construction of the character of the cession of the whole "leased district," and therefore a determination in the claimants' favor, binding on the court, of the issue as to the lands now in question. The court below did not sustain this contention, holding very properly that the jurisdictional act

repealed that of 1891 as far as concerns the construction of the cession of 1866, but it further held, however, that the act of 1891 was "valuable as showing by way of argument that a trust in favor of the claimants was created by the treaty of 1866 on all the lands included in the cession, and as showing that if Congress regarded the matter in that light the claimants probably understood the matter in the same way when they executed it." (Rec., 412.)

It is submitted that the act of 1891 can not even have the moderate value which the court below puts upon it. If it has no binding force as law, in regard to this matter of the character of the cession, then its only value must be as showing that a majority of the members of the Senate and House, as individuals, believed that the cession was in trust, but their opinion carries weight only in proportion to their knowledge of all the facts of the case, so that the really important matter is the character of the representations made to Congress, and upon which it acted. In the second place, the opinion of Congress in 1891 is no fairer criterion of the opinion of the appellees in 1866 than it is of the opinion of anyone else. One may argue that inasmuch as a Congress composed of presumably reasonable men held such an opinion, other reasonable men might be expected to take the same view, but this amounts to no more than to say that the view that the cession of 1866 was in trust is a reasonable view to take, and hence that the appellees, or anyone else, may reasonably be supposed to have taken it in 1866, or at any other time. Whether the view is reas-

onable or not, however, depends upon whether it is borne out by the facts as they existed in 1866, for unless the alleged trust existed then, when the treaty was made, it can not possibly have existed subsequently.

Treating the statement in the act of 1891, then, as a collective expression of opinion on the part of the individual members as to the character of the cession of 1866, the weight to be attached to the opinion so expressed necessarily depends on the extent to which the members of the Senate and House held it and upon the grounds on which it was based, both of which matters may properly be inquired into without indulging in any assumptions of misinformation or improvident action.

The opinion was certainly very far from being unanimously held. In 1890 both the Choctaws and the Chickasaws presented memorials to Congress (House Rept. 3147, Fifty-first Congress, first session; Sen. Mis. Doc. 107, *id.*), and bills to pay their alleged claims were introduced into both Houses. The House bill (H. R. 12106) called for an appropriation of $6,211,714.65 to be paid to the Choctaws and Chickasaws in extinguishment of all their alleged right, title, and interest in and to the leased district, not including Greer County, the ownership of which was then in dispute, being $1.05 an acre for 6,201,633 acres, less the $300,000 paid under the treaty of 1866. (21 Cong. Rec., 10321.) The Senate bill was apparently a duplicate; but neither passed, and only the House bill was debated, meeting with strong opposition. (22 Cong. Rec., 183–191, 312.)

In the expiring days of that Congress, on February 28, 1891, when the Indian appropriation bill was before

the Senate, and shortly after the Cheyenne and Arapahoe agreement had been inserted therein as an amendment, the second paragraph of section 15 (the paragraph already cited in full, on which the claimants rely as a legislative interpretation of the cession of 1866) was inserted as a further amendment, calling for an appropriation of $2,991,450. (22 Cong. Rec., 3525.) After some opposition the amendment was adopted; but when the House refused to concur in the Senate amendments this particular amendment was singled out as the one which should under no circumstances be agreed to. (22 Cong. Rec., 3684.) In spite of this the bill, as amended, was passed in the last hours of the session.

In view of the opposition developed in the House to the bill to pay the whole Choctaw and Chickasaw claim, and also the opposition to the payment of the particular portion of that claim covered by the act of 1891, it is fair to infer that the provision in the latter act would never have passed had it not been inserted by the Senate in the last days of the session. As a collective expression of opinion, therefore, it carries very little weight. It carries still less weight when the arguments advanced in support of it are examined. These are found in House Report No. 3147, Fifty-first Congress, first session, and Senate Mis. Doc. No. 107, of the same session. The House report was made upon the memorial of the Choctaws and Chickasaws in regard to the "leased district." This memorial, annexed to the report, started out with the proposition that the land granted to the Choctaws in 1820 included "a tract containing over 6,000,000 acres west of one hundredth meridian, in what is now called

the 'Panhandle of Texas,'" and that "on February 19, 1821, the United States ceded this latter tract, of exceeding 6,000,000 acres in the Panhandle, belonging to and paid for by the Choctaws, to the King of Spain as part compensation for the Florida purchase." That these statements were wholly erroneous, and that no such land was ever granted to the Choctaws, has already been sufficiently shown. This error was the corner stone of the whole memorial.

The memorial further stated that the $800,000 were paid under the treaty of 1855 for the relinquishment of the 6,000,000 acres as well as for the lease of the "leased district," thus belittling the consideration paid for the lease. It also misrecited the fifth stipulation presented at the Fort Smith council, as follows:

As presented at Fort Smith council.	*As quoted in the Choctaw memorial.*
A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.	A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein.

This erroneous version of the fifth stipulation did not, it is true, originate with the memorial. It appears in the Indian Commissioner's report for 1865 (House Ex. Doc. No. 1, Thirty-ninth Congress, first session, vol. 2, p. 202), in a brief résumé of the proceedings at the Fort Smith council, wherein all the seven stipulations are very much abbreviated, obviously for the purpose of condensation

merely. While this abbreviated statement is certainly very carelessly drawn, in that it departs from the language of the original in several particulars, its wording would be unimportant were it not that it was insisted in the court below that it referred from the first to the cession of the "leased district," and must be read into Article III of the treaty of 1866 as an authoritative declaration of the purposes for which that cession was made. There is, however, nothing to be found in the report in which this form of the fifth stipulation first occurs to indicate that it referred to the cession of the leased district at all, that cession not having been proposed when the report was made. As already stated, the treaty "agreed upon" in 1865, referred to in the report, did not cover any cession or "purchase" of the leased district, but merely a removal of the restriction as to the tribes for which it could be used. It was not till the next year, after the Indian delegates came to Washington, that a sale of the leased district was proposed and agreed upon.

The memorial went on to state that "on the basis above set forth," i. e., on the basis of the misrecited fifth stipulation, the leased district was ceded "on a nominal consideration of $300,000, every dollar of which, by the same article (third) of the treaty, was to be given to the negroes whom the Government agreed to move out of the limits of these nations." In view of the gross misstatement of the operation of Article III to the provision to be made for the negroes, it is not surprising that the memorial failed to point out that in so far as the $300,000 might be used for the benefit of the negroes, it relieved

the Choctaws and Chickasaws of their obligation to provide for them.

These statements of the memorial then led up to the following:

> This cession was made as a trust for the sole and only purpose of providing homes for friendly Indians at a nominal cost to the Government, who had the responsibility of their care. This cession was not intended either by the Choctaws and Chickasaws, nor by the United States, to convey to the Government the fee-simple title patented to the Choctaws. The tenth and forty-fifth articles of the treaty of 1866 reenact the former guaranties that this country should not be subject to homestead settlement, nor included within the limits of a State or Territory.

The memorial referred to the authorities for the construction of Indian treaties as understood by an "unlettered people," to various expressions of opinion by Government officers, supposed to support the memorialists' construction, and to the treaties with the other civilized tribes, and it concluded with a petition that the commission appointed under the act of March 2, 1889, § 14 (25 Stats., 1005), to negotiate for the cession of Indian lands, might be authorized to negotiate with the Choctaws and Chickasaws for the leased district. It was from beginning to end an artfully drawn and very misleading instrument.

The memorial was referred to the Committee on Indian Affairs, who, on September 22, 1890, submitted the report in question, accompanying the bill already referred to (H. R. 12106), to appropriate $6,211,714.65 in payment of the Choctaw and Chickasaw claim.

The report, instead of correcting any of the misstatements of the memorial, reasserted them all, as if they were indisputable facts, and added one new misstatement, viz, that the patent made pursuant to the Choctaw treaty of 1830 had—

> * * * covered the lands in question [i. e., the leased district] *as well as a large tract west of the one hundredth meridian.* The exact amount your committee can not fix, because of two different treaties that differ in boundaries. However, the amount is not less than 2,000,000 acres, and may be much more.

Even the memorial, with all its errors, had not stated that the patent, which was issued March 23, 1842, granted any land west of the one hundredth meridian, which was at that date the western boundary of the United States from the Red River to the Arkansas. The most that the memorial claimed as to the tract west of the one hundredth meridian was that the treaty of 1820 had ceded it, and that it had been wrongfully ceded to Spain in 1821. That the committee should have erred so grossly as to state, in the very first sentence of the report, that the Government had in 1842 issued a patent for "not less than 2,000,000 acres, and may be much more," west of the one hundredth meridian, i. e., outside the limits of the United States, is a significant comment on the spirit as well as the diligence with which the report was made. After that error nothing else could cause surprise.

The report contained a communication from the Acting Commissioner of Indian Affairs, who admitted that

the claim of the Choctaws and Chickasaws might be open to some question, but on the whole decided in its favor, except that he held that the $800,000 paid for the lease, and so much of the principal and interest of the $300,000 as had been paid, should be deducted. He also held the memorial to be premature, no movement to dispose of the leased district having yet been made. He failed to call attention to any of the misstatements of the memorial. On the whole, this communication, as well as the committee's report, might fairly be regarded as a brief in support of the claim.

The Senate document (Mis. Doc. 107, Fifty-first Congress, first session) contained the petition of the Chickasaws, with a brief in support thereof drawn by their present counsel. Both petition and brief laid great stress on the original cession of land west of the one hundredth meridian to the Choctaws, and of the relinquishment of the claim for that land being the exclusive matter for which the $800,000 were paid under the treaty of 1855. One statement of the petition merits special attention, viz:

> By the same treaty [of 1820] the United States ceded and conveyed to the Choctaw Nation, in exchange, a territory west of the Mississippi. * * * The land so conveyed west of the ninety-eighth meridian was bounded on the north by the Canadian River, on the east by the ninety-eighth meridian of west longitude, on the south by the Red River, *and on the west by a straight line drawn from the source of the Red River, in a northwesterly course, to the point where the Canadian River crossed the one hundred and third meridian of west longitude.*

This complete alteration of the language of the treaty—substituting the source of the Red River for the supposed source of the Canadian as the point where the line should be drawn for the western boundary, and running that line northwestwardly to where the Canadian crossed the one hundred and third meridian—is most significant as showing a complete misapprehension of what was really ceded by the treaty of 1820.

These two documents clearly show that the arguments presented to Congress in 1890–91 in support of the Choctaw and Chickasaw claim were based upon an erroneous construction of the treaty of 1820, and, consequently, of that of 1855, while the bearing of the stipulations of 1865 upon the treaty of 1866 was also erroneously stated. Hence the action of Congress in making the appropriation of March 3, 1891, was manifestly due to misinformation, and in no way constitutes a precedent to be followed. In connection with that action, however, the court below points out (Rec., 411) that the next Congress did not disturb what had been done, in spite of the President's message on the subject. That matter may, therefore, be briefly reviewed.

On February 18, 1892, the President sent to Congress a message in regard to the appropriation of 1891, saying:

> If this section had been submitted to me as a separate measure, especially during the closing hours of the session, I should have disapproved it; but as the Congress was then in its last hours, a disapproval of the general Indian appropriation bill, of which it was a part, would have resulted in consequences so far-reaching and disastrous that I felt it my duty to approve the bill.

he message stated that the Choctaw agents were to
e received 25 per cent of the amount appropriated for
tribe, and that although that agreement had been
ified the tribe should be protected against extortion;
t the President, "after a somewhat careful examina-
of the question," did not believe that the Cheyenne
Arapahoe Reservation, in the leased district, had been
ded in trust," as stated in the act, and that, at all
nts, a considerable proportion of the $800,000 paid
der the treaty of 1855 should have been deducted.
n. Ex. Doc. No. 42, Fifty-second Congress, first ses-
n.) This message bore fruit the following year in
e proviso to the joint resolution of January 18, 1893
7 Stats., 753), and also three years later, when the pres-
t claim was referred to this court for decision instead
being met by an appropriation, as in the case of the
aim for the Cheyenne and Arapahoe Reservation. The
propriation for that claim, however, had been made
d could not be unmade, except presumably for fraud,
r such mistake as would virtually have the effect of
raud, and nothing of that sort was set up by the mes-
age. It is not surprising, therefore, that the message
id not affect the payment of the appropriation.

The message led, however, to further memorials from
he Choctaws (Sen. Mis. Doc. No. 95, Fifty-second Con-
gress, first session) and the Chickasaws (Sen. Mis. Doc.
No. 82, same session), and to reports upon the message
and memorials in both Houses of Congress. The memo-
rials contained all the erroneous statements of the prior
memorials, as did also the reports. The Senate report
(Sen. Rep. No. 552, Fifty-second Congress, first session)

relies at the start on the mistaken theory that the treaty of 1820 ceded to the Choctaws a large tract west of the one hundredth meridian, which was subsequently ceded to Spain, and that the $800,000 was paid in 1855 for the relinquishment of the Choctaws' claim for that tract and not for the lease. It is also significant that the report purports to take its statement of the stipulations presented at the Fort Smith council from "a report made to Congress in this case by the Indian Office September 13, 1890" (the report is given in full in House Report No. 3147, Fifty-first Congress, first session, at pages 6 to 15); but, instead of quoting the fifth stipulation correctly, gives it in the altered form in which it appears in all the Choctaw and Chickasaw memorials, the inaccuracies of which have already been referred to.

The House report (House Rep. No. 1661, Fifty-second Congress, first session) can not claim even the merit of colorable originality, being word for word the Senate report over again, excepting only that, having been presented two months later, it referred to the opening of the Cheyenne and Arapahoe lands to settlement as an accomplished fact, and that it omitted the reference to Mr. Cannon's and Secretary Noble's statements. (Sen. Rep., p. 28.) Both reports conclude by recommending the adoption of a resolution that "for reasons set forth in the report * * * it is the opinion of the Senate ["House of Representatives," in the House report] that there is no sufficient reason for interference in the due execution of the law referred to," i. e., the appropriation of March 3, 1891. Both Houses ultimately adopted the resolution,

though with considerable dissent. In the Senate this was done May 9, 1892 (23 Cong. Rec., p. 4093), and in the House December 16, 1892 (24 Cong. Rec., p. 178).

Without going into every detail of the reports and memorials in regard to these claims, it may be said, in brief, that they show conclusively that Congress was misinformed as to the true boundaries of the cession to the Choctaws in 1820, and consequently as to the real object for which the $800,000 was paid under the treaty of 1855; so that, starting with mistaken ideas on these two points, Congress, in so far as it was influenced by these documents, easily fell into error as to the circumstances attending the cession of 1866, and the real effect of that cession. Based on erroneous premises, as they manifestly are, the conclusions stated in the reports can not carry the weight that would ordinarily attach to such documents. To whatever extent the members of either House of Congress really believed in the Choctaw and Chickasaw claims, they must have done so in consequence of what appeared in these documents, i. e., they must have been deceived by these documents. As a collective expression of the opinion of Congress in regard to the Choctaw and Chickasaw claims, therefore, the provision appropriating $2,991,450 in the act of 1891 carries no weight, either singly or in connection with the resolution in regard to the President's message, the appropriation being practically the enactment of the Senate alone, and of a misinformed Senate at that, while the adoption of the resolution, though the act of each body, may fairly be ascribed to the same misinformation. The court below

must, therefore, be regarded as in error in considering the action of Congress in 1891 as any reason whatever for concluding that the cession of 1866 was in trust.

(c.)

The third reason which the court below gives for its conclusion is that "so many things" were annexed to the cession, and that the terms of the treaty involve contradiction and inequality. The opinion says:

> Following the cession is a proviso relating to the disposition and uses of the fund. Then come numerous articles covering many subjects with much circumstantiality of detail. (Rec., 414.)

These articles are briefly referred to, after which the opinion goes on to say:

> Why *so many things* should be annexed to a simple cession of land, if the transfer was meant to become absolute, does not appear. * * * There is, at least, enough of *contradiction and inequality* to create the belief that as the parties did not see fit to make the cession for so much money to be paid and stop at that, something else was intended by one party or the other, or by both. (Rec., 415.)

This reason of the court below has already been considered somewhat, in the first part of this brief, in discussing whether there was anything in the treaty to warrant the court below in resorting to explanations and qualifications of the plain words of cession instead of taking them just as they stood. It was there shown that neither Articles X and XLV, nor Articles III and XLVI, nor any other part of the treaty, were at all inconsistent with

an absolute cession. That discussion was of course confined to what appeared on the face of the treaty itself; but if it be assumed that the court below may have been warranted in going behind the plain language of the treaty in its search for the true interpretation, something remains to be said in explanation of the provisions of Article III as to the control and disposition of the $300,000, so as to make it clear that they can not possibly affect the character of the cession. The Choctaws and Chickasaws had already been told that they must make a treaty containing, *inter alia*, substantially the following stipulation, the third of the series:

> 3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage and for their incorporation into the tribes *on an equal footing with the original members, or suitably provided for.*

It appears from Article III that the Choctaws and Chickasaws were to be more favorably treated, as regards the provision to be made for the freedmen, than were the Creeks, Cherokees, and Seminoles. These latter were required by their treaties to admit their freedmen to "all the rights," both property and political, of the native citizens of the tribes. In their case "incorporation into the tribes on an equal footing with the original members" was to be literally required. The Choctaws and Chickasaws, on the other hand, were not required to receive the freedmen into their tribes unless they chose to. If they did so choose, they were not required to grant them equal

property rights with themselves, but only to give them 40 acres apiece; while, if they preferred not to admit them to tribal membership, the United States was to remove the freedmen, who in that event would receive no land at all, but only the $300,000 (the consideration for the cession of the leased district). If the Choctaws and Chickasaws admitted the freedmen to citizenship, any individuals of the latter who preferred to remove were to receive $100 apiece out of the $300,000, instead of any share in the tribal rights or property.

This arrangement made the burden of the third stipulation proportionately lighter for the Choctaws and Chickasaws than for any of the other tribes, and there is no reason to suppose that the terms would have differed had the United States held no "lease" of any part of the Choctaw and Chickasaw land, and had the latter made no cession of any land whatever. Had there been no money coming to them from the United States on account of a cession, any money provision that would have had to be made for the freedmen would have been made out of the annuity moneys in the hands of the United States, and this whether the amount to be paid the freedmen was the full sum of $300,000, received in lieu of all other property and rights, or $100 apiece for such individuals as preferred not to become Choctaw or Chickasaw citizens. It could have made no possible difference in the terms whether the money came from one fund or another—from the sale of property or from annuities. It had to be the money of the Choctaws and Chickasaws, as they, not the United States, were the parties called upon to provide "suitably" for their freedmen.

It is manifest, therefore, that while the fact that the United States was to have in its hands a particular fund of $300,000, belonging to the Choctaws and Chickasaws, made it convenient to use this particular fund for carrying out the arrangement made with them in pursuance of the third stipulation, this had absolutely nothing to do with the source whence this fund was derived, or with the character of the interest acquired by the United States under the cession for which the fund was the consideration. The reasons for applying the fund in this particular way were precisely the same whether the cession was absolute or in trust.

The discussion of the effect of the provision in regard to the fund realized from the cession can not be completed without alluding to what the court below says in another part of the opinion, as follows:

> Stripped of all technical considerations, the practical effect of the claim for the absoluteness of the cession is such as to involve the taking by the white man, for a consideration to be applied to the benefit of the black man, some millions of acres of land belonging to the red man; the transfer so operating as to enable the whites to keep the land and the red people to get the consideration only by surrendering its equivalent to the blacks. That the Government took the ceded land followed by some sort of a use in the grant in those making the cession seems probable, unless the intention existed to wrong the grantors, and that we can not any more believe than we can to entertain the suggestion that it was the policy of the United States to take this land from the claimants because of their participation in the rebellion. (Rec., 420.)

It is submitted that this is wholly erroneous. Aside from the important fact, wholly omitted in this statement, that the Government already possessed, as against the Choctaws and Chickasaws, a very large and potentially exclusive interest in this land, it is indisputable that the Choctaws and Chickasaws were required, under the fourth stipulation, to make a suitable provision for their freedmen, 8,000 or more in number, the money value of which provision, if made in land, would probably considerably exceed $300,000. They would have had to do this, even if the "leased district" had not been ceded at all, so that the fact that they were to "get the consideration" for the cession "only by surrendering its equivalent to the blacks" did not impose any additional burden upon them, nor involve the probability of any "use in the grant in those making the cession, unless an intention existed to wrong the grantors."

(d.)

The fourth reason given for the conclusion of the court below is that the fifth stipulation called for a setting apart of land "for the friendly tribes now in Kansas and elsewhere," and that no such setting apart is provided for in the treaty outside of Article III, so that "the fifth stipulation is either implied from the language of the third article or omitted altogether from the treaty." (Rec., 418.)

The fifth stipulation is as follows:

> A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be

agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

These words are very important, as they have frequently been misquoted, and it was insisted in the court below that the misquotation was the correct version. The only lands referred to were such as were already "occupied" by the tribes who were to make the treaties, and nothing was said about a purchase of the lands, which were merely required to be "set apart," "on such terms as may be agreed upon by the parties," i. e., by the tribes who owned and occupied them and the tribes for whom they were to be set apart. These terms were to be approved by the Government, and in case of need fixed by it, if "the parties" failed to agree. There is not one word to indicate a purchase by the Government. If the "terms" involved a purchase in any instance, as was possible, such purchase was manifestly to be made by "the friendly tribes in Kansas and elsewhere," not by the United States. It might fix the terms, and, as treasurer of the tribes, pay over the money in the event of a purchase, but it was not the purchaser.

In the treaty proposed in 1865 this stipulation was incorporated in the following form:

> ART. 4. The Choctaw and Chickasaw tribes of Indians hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere, upon such terms as may hereafter be agreed upon by the respective parties and approved by the Government, and the Government may settle such

friendly Indians on a portion of said territory *east of the ninety-eighth degree of west longitude*, not necessary for the use of said Choctaw and Chickasaw tribes, as it may desire, not exceeding one-third of the whole remaining territory, for a fair and equitable consideration, to be fixed by the Government. (Rec., 453.)

The right to use the "leased district" for the settlement of any Indian tribes or bands without restriction was provided for at the same time in another section, but even if the proposed treaty had been silent as to the "leased district," it would still have been clear that, according to that treaty, the fifth stipulation was not to be carried out in that district, but in the "territory east of the ninety-eighth degree of west longitude."

To anyone bearing in mind the language and evident meaning of the fifth stipulation, as well as what had been proposed in 1865, the embodiment of the stipulation in the following articles of the treaty of 1866 becomes apparent:

ARTICLE XXX. The Choctaw and Chickasaw nations will receive into their respective districts east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, * * * and among others the right to select land as herein provided for Choctaws and Chickasaws [i. e., one quarter section for

each person, male or female, adult or minor, in severalty, see Articles XV, XXXIII]. * * *

ARTICLE XXXI. And whereas some time must necessarily elapse before the surveys, maps, and selections herein provided for can be completed so as to permit the said Kansas Indians to make their selections in their order, during which time the United States may desire to remove the said Indians from their present abiding places, it is hereby agreed that the said Indians may at once come into the said Choctaw and Chickasaw nations, settling themselves temporarily as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

ARTICLE XXXVII. In consideration of the right of selection heretofore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw nations, out of the funds of Indians removing into said nations, respectively, under the provisions of this treaty, such sum as may be fixed by the legislatures of said nations, not exceeding one dollar per acre, to be divided between the said nations in the proportion of one-fourth to the Chickasaw Nation and three-fourths to the Choctaw Nation. * * * (14 Stats., 777, 778.)

These provisions cover, but with greater particularity of detail, precisely what was covered by the proposed treaty of 1865 in its fourth article. The phrase "civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory," is obviously equivalent to the words of the fifth stipulation, "the friendly tribes in Kansas and elsewhere," the words "known by the general name

of the Kansas Indians" excluding the idea of any limitation to the tribes actually residing in Kansas, and the civilized Indians to the north of the Indian Territory being the only ones who could be described as friendly to those within that Territory. Practically it may be said that the tribes referred to were those within what was called the Central Superintendency, the office of which was at Atchison, Kans., or at least to the civilized tribes within that superintendency, which at that time included the Shawnees, Kickapoos, Miamis, Kaskaskias, Weas, Peorias and Piankeshaws, Kansas, Ottawas, Sacs and Foxes, Chippewas, Delawares, Wyandots, and Pottawatomies. The Pawnees, Otoes and Missourias, and Iowas until recently within that superintendency were probably also referred to. (See House Ex. Doc. No. 1, Thirty-ninth Congress, first session, p. 543.)

It is needless to say that the Indians referred to in Article XXX did not include the Wichitas and affiliated bands, they not being "Indians to the north of the Indian Territory," but having merely taken refuge temporarily in Kansas, whence they returned in 1865.

To limit to 10,000 the number of the Indians to be received was certainly not unreasonable, some limit being manifestly needed, and it is clear that Articles XXX, XXXI, and XXXVII, which constituted an agreement to set apart a portion, up to 1,600,000 acres, of "the lands hitherto owned and occupied by" the Choctaws and Chickasaws, the "terms" being fixed at $1 an acre, were a full embodiment of the fifth stipulation.

The opinion of the court below, however, is that "the fifth stipulation meant *tribal* occupancy, and a future

agreement with reference to this kind of an occupancy, and there is no such agreement to be found in article 30." (Rec., 417.) In insisting that a stipulation to set apart land "for the friendly tribes now in Kansas and elsewhere" means that the Indians who should settle on the land set apart should retain their own separate tribal organization and not be received into the Choctaw and Chickasaw tribes, the learned judge overlooks two things, first, that the stipulations were not final statements of precisely what the provisions of the treaties were to be, but were to be "substantially" contained in them (and that this substantial embodiment might permit a considerable departure from the strict language of the stipulations has already been seen in regard to the fourth one), so that the stipulation as to land for Indian tribes does not necessarily mean that their particular tribal organizations were to be retained, and, second, that the fourth article of the proposed treaty of 1865, the article which manifestly embodied the fifth stipulation, did not use the words "tribes," but spoke of "the settlement of friendly Indians from Kansas and elsewhere," an expression which would cover any kind of settlement, including incorporation into the tribes whose country was opened to such settlement. This objection to regarding Articles XXX, XXXI, and XXXVII as the embodiment of the fifth stipulation can not, therefore, be sustained.

The opinion also objects that as the fifth stipulation speaks of "friendly tribes now in Kansas and elsewhere" it can not be embodied in Article XXX, which provides

for "civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory." Again, the learned judge has forgotten that the stipulations were to be embodied "substantially," and not word for word. The expression, "Kansas and elsewhere," certainly includes "to the north of the Indian Territory," and Article XXX further describes the Indians who are to be settled as "known by the general name of the Kansas Indians," a description clearly within the application of the fifth stipulation. The objection amounts to this, that the Indians mentioned in Article XXX are only a portion of those mentioned in the fifth stipulation; but as the fifth stipulation applied to the land of other tribes besides the Choctaws and Chickasaws, it was perfectly reasonable to define in some measure the extent to which that stipulation was to be carried out in the case of these two particular tribes.

The opinion further objects that the settlement provided for in Article XXX is connected with a scheme for a survey of the lands of the Choctaws and Chickasaws, and their division in severalty, the adoption of which scheme was dependent on the will of the Choctaw and Chickasaw legislatures, as provided in Article XI, and that the fifth stipulation did not contemplate giving the tribes whose land was to be set apart any right to decide whether or not this should be done. It is submitted that a careful perusal of the treaty will show that this objection can not be sustained.

It is true that by Article XI the proposed survey and division of the land in severalty was not to take place

unless the legislative councils of the Choctaw and Chickasaw nations agreed, and that the right of selecting lands in severalty, secured to the Kansas Indians under Article XXX, was necessarily dependent on the action of those councils, but the right of these Indians to be received into the country and to settle down there was absolute, whether the councils agreed to the proposed plan or not, as the following provisions show:

ARTICLE XXX. The Choctaw and Chickasaw nations *will receive* into their respective districts east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow citizens, * * * and among others the right to select land as herein provided for Choctaws and Chickasaws. * * *

ARTICLE XXXI. And whereas some time must necessarily elapse before the surveys, maps, and selections herein provided for can be completed so as to permit the said Kansas Indians to make their selections in their order, during which time the United States may desire to remove the said Indians from their present abiding places, it is hereby agreed that the said Indians may *at once* come into the said Choctaw and Chickasaw nations, settling themselves temporarily as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

The words "will receive," in Article XXX, involve a positive declaration of readiness to do a certain thing in the future, a positive agreement to receive these Indians whenever the United States should send them there, whatever the legislative councils may decide as to the plan for dividing the land. Could there be any possible doubt as to this, the words "at once" in Article XXI would remove the doubt. The Kansas Indians were (subject to the control of the United States, of course) to be received into the Choctaw and Chickasaw districts at once, and to settle themselves as citizens upon such land as suited them and was not already occupied. The United States was free to decide when it would send the Kansas Indians there, or whether it would in the end send them there at all, but it clearly had a right to do so "at once," upon the final ratification and proclamation of the treaty, without waiting for the legislative councils to act on the proposed plan.

Seeing, then, that the Kansas Indians could have been brought into the Choctaw and Chickasaw country before the legislative councils acted, there is no warrant for saying that the right to bring them there was in any way dependent on the action of those councils. The right to select land in severalty was so dependent, but not that of settling on the land as citizens. Presumably the United States commissioners had been assured that the legislative councils would approve the plan proposed, as otherwise it would not have been covered by the treaty at all, but whatever the degree of confidence with which they expected its adoption, they certainly did not make the

admission of the Kansas Indians dependent on such adoption.

The fact that no Kansas Indians ever were settled among the Choctaws and Chickasaws, in accordance with the fifth stipulation and Articles XXX, XXXI, and XXXVII can not be taken to show that such settlement was to be dependent on the adoption of the scheme for dividing the land in severalty. It shows that the Government ultimately found that it had enough other land at its disposal whereon to place the Kansas Indians, for certainly none of them were ever left waiting to make their settlements until such time as the scheme would be adopted. Speculations may differ as to just why no Indian settlement ever took place under Articles XXX, XXXI, and XXXVII, but when the matter is properly looked into, the fact that those articles were incorporated into the treaty in pursuance of the fifth stipulation presented at Fort Smith, does not seem to admit of a doubt.

After stating that "for the reasons set forth, articles 30, 31, and 37 do not satisfy the requirements of the ultimatum presented at Fort Smith," the opinion goes on to say:

> The fifth stipulation is implied from the language of the cession, because as to the land west of the ninety-eighth degree it was to be set apart and presumably conveyed to carry out the purpose resting unmistakably in writing in the statement [i. e., the seven stipulations] of the president of the council at Fort Smith, and in the unsigned treaty offered by the commissioners of the United States before the adjournment of the council. If the purpose of the cession was not explicitly stated in the treaty the conditions were present upon which it was demanded

> and acceded to, and having been acted on under these circumstances the cession and the demand for it must be construed together as the thing the parties intended to consummate. (Rec., 419.)

This reference to the unsigned treaty, as showing that "the fifth stipulation is implied from the language of the cession" in Article III of the treaty of 1866 evidently shows that the learned judge forgot all about the fourth article of the unsigned treaty, a fact which appears also from another part of the opinion, as follows:

> There is nothing in the record to indicate that the Choctaws and Chickasaws had any information as to the purpose of the Government *except as embraced in the fifth proposition and the fifth article* of the unsigned treaty submitted at Fort Smith. These gave the Indians to understand that the purpose was only to extend the rights of the United States in the land beyond the treaty of 1855, and this purpose was also understood by the United States. (Rec., 403.)

As the *fourth* article of the unsigned treaty clearly and unequivocally embodies the fifth stipulation, using even some of the identical language, while the fifth article merely frees the use of the "leased district" from certain restrictions, and this without any consideration whatever, this statement of the learned judge is clearly erroneous. The unsigned treaty shows, as clearly as anything written can show, that the purpose of the Government in 1865 was to apply the fifth stipulation to "a portion of" the Choctaw and Chickasaw territory "east of the ninety-eighth degree of west longitude, not necessary for the use of said Choctaw and Chickasaw tribes," and to do

this "for a fair and equitable consideration, to be fixed by the Government," while the "restriction as to the character of the tribes" who could be settled on the "leased district" was to be done away with, this modification of the terms of the lease being something wholly outside of the "demand" of the fifth stipulation, and being without the fragment of any further consideration, apparently because it was in no way injurious to the Choctaws and Chickasaws.

The learned judge's idea of the connection between the fifth stipulation and the cession of the "leased district," therefore, being manifestly due to his overlooking the fourth article of the unsigned treaty, must be regarded as wholly erroneous, and the conclusion must be that the court below has erred in supposing that the fifth stipulation was not substantially embodied in Articles XXX, XXXI, and XXXVII.

(e.)

The fifth reason of the court below for holding that the "leased district" was ceded in trust is stated as follows:

> The theory that the cession became absolute involves the United States in the plan of deliberately abandoning the original lease of the ceded territory. By that lease the Government already had all the rights it wanted in the land except the privilege of putting Indians there not named in the lease. The effect of the abandonment of the lease would include an abandonment of the very purpose for which the lease was taken, for if the leased land was to become a part of the public domain it ceased to be Indian country. Every stipulation that the country should

be kept intact as Indian country would thus be violated as well as every policy of the Government reversed. (Rec., 421–422.)

It is submitted that the mere fact that an absolute cession entitled the United States, as far as concerned the Choctaws and Chickasaws, to cease using the district for Indian settlement, does not warrant the inference that in 1866 the United States had any intention of ceasing so to use it. As regards the Wichita and affiliated bands, the Government was bound to continue such use of the district. Those Indians had already been settled in the district, and although the rebellious Choctaws and Chickasaws had driven them north into Kansas, they had a right to return and remain permanently, or until some other equally just arrangement should be made with them. That the country was not already filled up with other Indian tribes was, like the expulsion of the Wichitas, a result of the rebellion of the Choctaws and Chickasaws, which had prevented the Government from carrying out its policy under the lease, but the Government had still every motive for continuing to use the land in the manner originally intended, but without any restrictions or limitations in favor of the Choctaws and Chickasaws. There can be no possible doubt that in 1866, and until recently, this whole district has been more fit for Indian settlement than for any other purpose, especially in view of the Government's settled policy of keeping Indians on reservations in the Indian country and of keeping white settlers out of those reservations; a policy which has only within the last few years been supplanted on any extensive scale by the other and more-advanced policy

of distributing a portion of Indian land in severalty, with restrictions on alienation, and of selling the balance for the benefit of the Indians. The absolute purchase of the leased district, the extinguishment of the remaining interest of the Choctaws and Chickasaws therein, was not an abandonment, but an extension "of the very purpose for which the lease was taken." By such purchase the Choctaw and Chickasaw right of settlement was terminated, so that thereafter the land could be used exclusively for such Indians as the Government should see fit to settle upon it, and whenever the policy of maintaining Indian reservations should come to an end the Government should be entitled to dispose of the land as best suited its own interests and those of the Indians settled thereon, without any interference by the Choctaws and Chickasaws or accountability to them. Accordingly the United States ultimately established three reservations (one for the Cheyennes and Arapahoes, another for the Kiowas, Comanches, and Apaches, and a third for the Wichita and affiliated bands), which together covered the entire "leased district," except the portion claimed by Texas and know as Greer County. But for the accident of the dispute over the title to Greer County, it also would certainly have been used as an Indian reservation, its location being favorable for carrying out the policy of concentrating the reservations, as far as practicable, into one Indian country, rather than scattering them through the regions opened to white settlement.

In the portion of the opinion last above quoted the learned judge appears to think that if the Government substituted an out-and-out purchase for a lease, it would

necessarily have ceased to use the land for Indian purposes, and have made it "part of the public domain," i. e., open to white settlement. He gives no reason why a continued use of this land for settlement by such Indians as the Government might wish to place there (a use begun in 1859 and only interrupted by the rebellion of the Choctaws and Chickasaws) should be inconsistent with the extinguishment of all right, title, and interest therein on the part of *other* Indians, for whose settlement it was *not* desired to use the land, and it is submitted that no valid reason can be given. In fact, it is safe to say that any man of ordinary intelligence would hold that if the Government wished to use any land for Indian settlement, the only wise course for it to pursue would be first to extinguish all outstanding titles to it (just as it extinguished the Quapaw title in 1818, before ceding to the Choctaws the land which it gave them in 1820) in order that in future it would only have to deal with the actual occupants of the land, and would not have to reconcile the conflicting interests of such occupants and outsiders. For the purpose of Indian settlement an absolute cession, as, it is submitted, the cession of 1866 was, extinguishing all claim of the Choctaws and Chickasaws to the land, was a most sensible and businesslike substitute for the rather indefinite "lease" of 1855.

The suggestion of the learned judge that "every stipulation that the country should be kept intact as Indian country would thus [i. e., if the cession were absolute] be violated," is, it is submitted, merely begging the

question. Under Articles X and XLV the stipulations of former treaties were renewed only "in so far as they are consistent with the provisions of" the treaty of 1866. Prior stipulations for the permanent retention of the country as Indian country were clearly inconsistent with an absolute cession, and, as to the land so ceded, could no longer be invoked by the Choctaws and Chickasaws, even though the United States might see fit to retain the land as Indian country for an indefinite time. If these stipulations continued to apply to the "leased district," this could only have been *because* the cession was not absolute, but the character of the cession is the very matter in dispute.

As to Article XLIII, it provides that no white person, with certain exceptions, "shall be permitted to go into *said territory*," unless he be a formally naturalized Choctaw or Chickasaw. The provision is obviously limited to "said territory," and the meaning of this term is made clear by referring to the prior sections of the treaty. The "territory" referred to must be the same as is referred to in Article XLII in the words "their limits," i. e., those of the Choctaw and Chickasaw nations; and in Article XXXIX in the words "the Choctaw or Chickasaw country." It is beyond dispute that these words in Articles XXXIX and XLII refer to the country east of the ninety-eighth meridian, and not to the "leased district," and the same must be true of the words "said territory" in Article XLIII. The United States agreed that white men should not go into the Choctaw and Chickasaw territory, but made no such agreement in this

treaty of 1866, as regards the "leased district." In Article II of the Kiowa and Comanche treaty of October 21, 1867 (15 Stat., 582), there is precisely such an agreement as to so much of what had been the "leased district" as was then given to the Kiowas, Comanches, and Apaches for a reservation, as appears from the following:

> And the United States now solemnly agrees that no persons except those herein authorized to do so, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservation in discharge of duties enjoined by law, shall be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation, for the use of said Indians.

Now, if the United States was already bound, under Article XLIII of the Choctaw and Chickasaw treaty of 1866, to keep unauthorized persons off the district in which this reservation was located, the above agreement was useless; but as the treaty-making power can not be presumed to have entered into useless agreements, the inference must be that it was then believed that Article XLIII of the treaty of 1866 had no reference to this district.

It is to be observed that the Government's acquisition of an absolute title to this land as against the Choctaws and Chickasaws did not make it public land subject to entry under the preemption law, because the Wichita and affiliated bands still had a title to a part of it in consequence of their settlement there in 1859, while, as a

matter of fact, the whole district was still reserved for Indian purposes. The preemption laws in force in 1866 granted the right of entry subject to "conditions, restrictions, and stipulations." (See act of June 2, 1862, § 1, 12 Stats., 413.) By the treaty of 1855 the United States had acquired the right to use the "leased district" for Indian settlement, and this right of the United States having once come into existence, could not be destroyed by mere acquisition by the United States of an absolute title. The act of September 4, 1841, section 10 (5 Stats., 456), excepts from liability to preemption all "lands included in any reservation by any treaty, law, or proclamation of the President of the United States, or reserved for salines or for other purposes," and this provision is among the "conditions, restrictions, and stipulations" to which the right of preemption was subject by the act of June 2, 1862. (12 Stats., 413.) This broad language clearly covers the case of the "leased district." After the cession of the remaining interest of the Choctaws and Chickasaws in the land, it continued to be, as it had been before, reserved for Indian settlement, and it could not become the subject of preemption until such time as the Government might cease to so reserve it.

Moreover, in addition to the specific appropriation of a portion of the district for the settlement of the Wichita and affiliated bands, the whole district had been appropriated to the use and occupation of the Comanches and Kiowas by the treaty of October 18, 1865, proclaimed May 26, 1866, a month and a half before the Choctaw and Chickasaw treaty of 1866 was proclaimed.

By the Comanche and Kiowa treaty (14 Stats., 717) the bounds of the reservation granted to those Indians were subject to future change by the President, and it was ultimately very much contracted by the treaty of October 21, 1867 (15 Stats., 581), but the existence of that treaty of 1865, apart from anything else, sufficiently explains why acquisition of an absolute title by the United States in 1866 did not subject the "leased district" to the right of preemption.

In this connection it may be well to notice another part of the opinion, where it is said:

> There is no evidence that it was the understanding that white people were to be excluded merely from the home country of the Choctaws and Chickasaws. What evidence we have points to the conclusion that the parties supposed the guaranty on this subject related to the exclusion of the whites from all Choctaw and Chickasaw territory. The unsigned treaty asked for a modification of the terms of the ninth article of the treaty of 1855, under which Indians were admitted and whites excluded. The modification sought the admission of other Indians only. Everything suggested in the negotiations related to the freedmen who happened to be in the country and to Indians who did not happen to be there; but all propositions were in line with previous treaties, which guaranteed the exclusion of white men and white men's government, with absolutely nothing to apprise the Choctaws and Chickasaws that the guaranties were meant for a part only of their territory. (Rec., 424.)

That the question of the admission of white men to the "leased district," whether immediately or in the

future, may not have been discussed in 1866 is possible, as the Government had no intention of admitting them *at that time;* but there is no evidence whatever pointing to the conclusion that the parties supposed that any of the guaranties of prior treaties would continue to relate to this district after its cession. The learned judge says that "all propositions were in line with previous treaties, which guaranteed the exclusion of white men and white men's government," and yet here we nave not merely a proposition, but a formal provision of the treaty, providing for an absolute cession, which was not at all in line with previous treaties, in that it terminated all the rights of the Choctaws and Chickasaws in regard to the district ceded, including the right to have white men excluded from it. He also speaks of "everything suggested in the negotiations." There is no evidence whatever as to what was suggested in the negotiations of 1866. The seven stipulations are a matter of record, and so are the negotiations of 1865, which did not go very far; but what took place in 1866 is not known, except from the results as they appear in the treaty. The greater part of the treaty is devoted to providing for the details of a system of government and land ownership not covered by the seven stipulations nor by the negotiations of 1865, and this being so, the fact that the cession of the "leased district," a matter which did not concern the other civilized tribes, was also outside of the stipulations and negotiations of 1865 need not cause surprise. The learned judge's idea that the treaty of 1866 was confined to the matters covered by those stipulations and negotiations is wholly without foundation in fact.

(f.)

The sixth reason of the court below for holding the cession to have been in trust relates to the treaties made about the same time with the Seminoles, Creeks, and Cherokees. The opinion says:

> That a use should have been retained to the Seminoles, the Creeks, and the Cherokees in the lands ceded by them while an implied trust did not result to the Choctaws and Chickasaws is incredible when we consider the purposes for which all the lands were wanted under the ultimatum addressed to all alike. (Rec., 421.)

If the Creek, Seminole, and Cherokee treaties, and what was done under them, be carefully studied, it will be seen that they furnish no warrant for concluding that the Choctaw and Chickasaw cession of the "leased district" was in trust. The cessions made by the Creeks and Seminoles were expressly stated to be for the settlement of Indians and freedmen, and although the effect of the language used was to create a quasi trust estate, and to entitle the Creeks and Seminoles to payment for so much of the land as was *not used for the purposes stated*, their reversionary rights were confined to that portion of the land. By the Cherokee treaty (Article XVI) there was no actual cession nor any trust, but future cessions to Indian tribes were provided for, and the United States ultimately bought outright the land which remained after such cessions occurred. These three treaties will be considered in succession.

The Creek treaty of June 14, 1866, provided as follows:

> ARTICLE III. In compliance with the desire of the United States to locate other Indians and freed-

men thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, * * * and in consideration of said cession of the west half of their lands, estimated to contain 3,250,560 acres, the United States agree to pay the sum of thirty (30) cents per acre, amounting to $975,168. (14 Stats., 786.)

The use of this land for Indian settlement was as follows:

	Acres.	Acres.
Assigned to Seminoles	200,000	
Assigned to Sacs and Foxes	479,668.05	
Assigned to Pawnees	53,005.94	
Total assigned lands		732,673.99
Partly appropriated to Indian uses:		
Cheyenne and Arapahoe Reservation	619,450.59	
Iowa Reservation	228,417.67	
Kickapoo Reservation	206,465.61	
Set apart for Pottawatomies	222,716.32	
Total so partly appropriated		1,277,050.19
Total assigned or partly appropriated		2,009,724.18
Leaving unassigned and unappropriated		1,392,704.70
Total land		3,402,428.88

Accordingly, the Creeks were paid 95 cents per acre (i. e., $1.25 less the 30 cents paid in 1866) for the 1,392,704.70 acres which had not been in any way used for the purposes for which the cession was expressly made, and 75 cents per acre for the 1,277,050.19 acres partly appropriated to Indian settlement, the reduction of 20 cents per acre being estimated as a fair value of such partial use, while for the land actually assigned to Indians for their settlement the Creeks received nothing, such assignment being in fulfillment of the purpose for which the

land had been ceded. (Sen. Ex. Doc. No. 98, Fifti Congress, second session.) The total amount paid w $2,280,857.10. (Act of March 1, 1889, 25 Stats., 75 see also document last cited.)

The Seminole treaty of March 21, 1866, provided follows:

> ARTICLE III. In compliance with the desire the United States to locate other Indians and free men thereon, the Seminoles cede and convey to th United States their entire domain, being * * In consideration of the said grant and cession their lands, estimated at 2,169,080 acres, the Unite States agree to pay said Seminole Nation the sum $325,362, said purchase being at the rate of fifte cents per acre. (14 Stats., 756.)

The words, "in compliance with the desire of th United States to locate other Indians and freedme thereon," clearly state the object of the cession, and ac cordingly a tract of 353,127.10 acres was assigned to th Pottawatomies and a tract of 1,189,194.15 acres to th Cheyennes and Arapahoes, leaving 495,093.37 acres un assigned. In point of fact, however, the Pottawatomie and Cheyennes and Arapahoes had been so well provide with land in addition to these tracts that but a smal portion of each tract could be regarded as having bee actually used "to locate other Indians thereon," withi the intent of the treaty. Accordingly when, in 1889 the Seminoles asked compensation for land not so used (Senate Ex. Doc. 122, 50th Congress, second session) th extent to which the land had been so used was computed as equivalent to 20 cents an acre on the whole assigned acreage, and the following settlement was made:

	Acres.
Acreage estimated in 1866	2,169,080
Actual acreage	2,037,414.62
Excess in estimate	131,666.38
1,542,321.25 acres, assigned to Indians, at 90 cents per acre	$1,388,089.12
495,093.37 acres wholly unappropriated to Indian uses, at $1.10 per acre	544,602.70
	1,932,691.82
Deduct cost of 131,666.38 acres, excess in estimate, at price paid in 1866	19,749.80
	1,912,942.02

Accordingly this amount was appropriated by the act of March 3, 1889, section 12 (25 Stats., 1004), and the United States acquired an absolute title as against the Seminoles.

The case of the Cherokee lands was different. Article XVI of the treaty of July 19, 1866 (14 Stats., 799), the only article which has anything to do with the present discussion, effected no cession of lands whatever, but merely provided that all or any portion of a certain district might thereafter be purchased for Indian tribes, and paid for by them, such purchases to be absolute, and not involving any trust for the Cherokees. The article reads as follows:

> ARTICLE XVI. The United States may settle friendly Indians in any part of the Cherokee country west of 90°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to

be distinctly marked, and the land conveyed in fee simple to each of said tribes to be held in common or by members in severalty as the United States may decide.

Such lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree then the price to be fixed by the President.

The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96° of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.[1]

Under the provisions of this article, the following purchases were made:

By the Osage and Kansas Indians, 1,570,196 acres, at 70 cents an acre, or in the aggregate $1,099,137.41 (Senate Ex. Doc. No. 56, Fifty-second Congress, first session, p. 13). This purchase was confirmed by the act of June 5, 1872 (17 Stats., 228).

By the Pawnees, a certain tract, the purchase of which was authorized by the act of April 10, 1876, section 4 (19 Stats., 29).

By the Poncas, a certain tract, under the authority of the act of May 27, 1878, section 1 (20 Stats., 76).

[1] Besides the land in Indian Territory west of the ninety-sixth meridian, the Cherokees had also land in Kansas, which, by Article XVII of the same treaty, was ceded and conveyed to the United States in trust to sell the same for the benefit of the Cherokees, the proceeds of all sales to be applied as provided in Article XXIII. The cession of these lands, however, being solely for sale as public lands, and not "for the friendly tribes in Kansas and elsewhere," had absolutely nothing to do with the fifth stipulation, which was embodied in Article XVI only.

By the Otoes and Missourias, a certain tract, under the authority of the act of March 3, 1881, section 5 (21 Stats., 380).

By the Tonkawas, a certain tract.

All of these purchases aggregated 2,121,928.80 acres, and the purchase money $1,827,526.87, but after they had all been made, 6,022,574.11 acres remained within the district mentioned in Article XVI of the Cherokee treaty of 1866, which 6,022,754.11 acres had not yet been sold by the Cherokees under that article. This unsold portion of the land was what the United States bought for about $8,300,000 under the act of March 3, 1893, section 10 (27 Stats., 640). The United States paid a little more than $1.25 per acre for this land, because the Indians demanded more, on the ground that they had not been paid enough by the tribes to whom the 2,121,928.80 acres had been sold, and this demand was yielded to in order to settle the matter. All this is clearly shown in Senate Executive Document No. 56, Fifty-second Congress, first session, page 13. The Cherokee treaty of 1866 had provided that after any of the land in question was sold to and occupied by other Indian tribes, the Cherokee "jurisdiction and right of possession [was] to terminate forever as to each of said districts thus sold and occupied," and this provision took effect as to such land. The United States afterwards bought outright the unsold balance, and paid an extra price for it to satisfy the Cherokees, who thought they had been cheated in the previous sales; but there was no trust in their favor to a single acre of this land, any more than there would have been in any land bought of

the Choctaws and Chickasaws under Article XXX of their treaty, had any purchases been made under that article.

It is therefore clear that the court below has erred in holding that what was done in the case of the Creeks, Seminoles, and Cherokees has any bearing on the character of the cession of the "leased district." The Creeks and Seminoles sold to the United States in 1866, for a small price, certain lands to which they had an absolute title, saving only the reversionary rights of the United States, and this sale was expressly made for a certain definite purpose. No further compensation was ever claimed by or paid to the Creeks and Seminoles on account of such part of the land as was actually used for this purpose, but the balance of the land, not having been so used, was ultimately bought outright by the United States for the price at which public lands are ordinarily sold, less the amount originally paid. The Cherokees sold no land whatever to the United States in 1866, but agreed to sell any part of a certain portion of their country to other Indian tribes, and did ultimately so sell a certain quantity of the said land, for which they received nothing further, except as a gift from the United States, to compensate them for alleged unfair treatment in their bargains with the other Indian tribes. The United States ultimately bought from them the unsold part of this portion of their country. Such transactions can furnish no warrant for a claim by the Choctaws and Chickasaws for additional compensation on account of land in which, when ceded, their title was already subject to rights of permanent settlement by other Indians

who had been or should be placed there by the United States, and the cession of which land was absolute in terms.

(g.)

The seventh reason of the court below for holding that the cession was not in trust relates to certain supposed admissions to that effect on the part of the United States. These matters will now be referred to in chronological order, so as to present each matter in its proper relation to previous matters, although this order is not followed by the court below.

(1.) The Delaware treaty of July 4, 1866 (14 Stats., 793). The preamble to this treaty states that "the United States have, by treaties negotiated with the Choctaws and Chickasaws, with the Creeks, and with the Seminoles, Indian tribes residing in said Indian country, acquired the right to locate other Indian tribes within the limits of the same," and by Article IV "the United States agree to sell to the said Delaware Indians a tract of land ceded to the Government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian country." The court below holds that "this language implied that the Government got as much of a title from one tribe as from another, no more and no less, and all for the same purpose." (Rec., 424.)

It is indisputable that the language treats the several cessions of land alike as far as concerns the Delawares, or, in other words, that it implies that the United States can give them an equally valid title under any of the

cessions, but it by no means follows that the title of the United States was of precisely the same character under all of them. The Seminole and Creek treaties (14 Stats., 755, 785), which have already been considered above, ceded land expressly for Indian settlement, and under them the United States could undoubtedly make the contemplated sale to the Delawares. It could do the same as to any part of the district ceded by the Choctaws and Chickasaws (except, of course, the land already assigned to the Wichita and affiliated bands, which land could not justly be taken away from them without their consent) whether that district had been ceded absolutely or for a special purpose. As far as concerned the power to grant lands to the Delawares, the rights of the Government under the Creek, Seminole, and Choctaw and Chickasaw treaties were equal; and this is in no way inconsistent with the fact that the Government's rights in the land ceded by the Choctaws and Chickasaws were such as to permit of its doing (if it preferred) something else with the land which it could not do with that ceded by the Creeks and the Seminoles.

It is to be observed that Article IV of the Delaware treaty refers to an expected cession by the Cherokees, whose treaty (14 Stats., 799) was made fifteen days later, and had presumably been already drafted, so that its provisions must have been known to the commissioners who executed the Delaware treaty, as also to the Senate, who had the two treaties before it at the same time. If the reasoning of the court below be correct, the Government's title under the Cherokee treaty must have been

the same as under the Creek and Seminole treaties, whereas in point of fact the United States had no title to lands whatever under the Cherokee treaty, but merely a right to settle friendly Indians in the Cherokee country, and whatever cession might take place would really be made to such Indians and not to the United States. This shows that the mere fact that the Delawares might have received Creek, Seminole, Cherokee, or Choctaw and Chickasaw land does not mean that the United States had precisely the same title to such land in the case of one tribe as in that of another.

(2.) The acts in regard to the further colonization of Indians in the Indian Territory. The opinion (Rec., 424) refers to a supposed general act on this subject passed in 1871, but it is submitted that no such act was passed. What the learned judge had in mind was, doubtless, certain provisions forbidding certain specified tribes whose presence in the Indian Territory would, for special reasons, have been undesirable, to be placed there by Executive action (act of February 28, 1877, as to the Sioux and Northern Cheyennes and Arapahoes, 19 Stats., 254; act of February 17, 1879, § 1, in regard to the Indians of Arizona and New Mexico, 20 Stats., 313), but it is not apparent what bearing these special provisions as to particular tribes, applying equally to all the unoccupied portions of the Indian Territory, can have on the character of the cession of the "leased district," especially as at that time the only unoccupied part of the leased district was Greer County, which was supposed to be a part of Texas.

(3.) Secretary Schurz's communication of May 1, 1879. The material portions of this communication are as follows:

> * * * The title acquired by the Government, by the treaties of 1866, was secured in pursuance and furtherance of the same purpose of Indian settlement, which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political State and Territorial organizations, and their present permanent location upon other lands sufficient for the needs of each tribe. These lands being ample in area for the purpose, it has become a settled policy to locate other tribes thereon as fast as arrangements can be made; and provision has been constantly made, by treaties, agreements, and acts of Congress, to effect these objects.
>
> That purpose is expressly declared in the said treaties. The cessions of the Creeks and Seminoles are stated to have been made "in compliance with the desire of the United States to locate other Indians and freedmen thereon." These words must be held to create a trust equivalent to what would have been imposed had the language been "for the purpose of locating Indians and freedmen thereon."
>
> The lands ceded by the Choctaws and Chickasaws were, by article 9 of the treaty of June 22, 1855, "leased to the United States, * * * for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein." The treaty of 1866 substituted a direct purchase for the lease, but did not extinguish or alter the trust. (Sen. Ex. Doc. No. 20, Forty-fifth Congress, first session, p. 17.)

The court below relies on these statements as in support of its position, but is far from being satisfied with

hem. It complains that the concluding statement "is naccurate as a legal proposition;" that "Secretary Schurz eems to have confused the matter of an express trust with a trust implied in law." It concludes, however, that whatever he said he must have meant a trust "in favor of the Choctaws and Chickasaws, and in them alone," and not "for the benefit of other Indians who had no interest in the ceded territory." (Rec., 425.)

It is submitted that the confusion is in the mind of the learned judge. He is so convinced that the land was held in trust for the Choctaws and Chickasaws that he wholly loses sight of those who were in any event the real beneficiaries or *cestuis que trustent*, viz, the Indians who were or were to be settled on the land. Whatever view the Secretary may have had as to possible reversionary rights of the Choctaws and Chickasaws (as to which he is silent), one thing is clear, that when he spoke of a trust he meant a trust in favor of the Indians who were or might be placed on the land. He was writing about the purposes for which the United States then (in 1879) held the Indian Territory, and its duties toward the Indians then located therein, but not about the rights of the tribes from whom any portion of the Territory had been obtained. His reference to the "trust" on which the so-called "leased district" was held meant, in the first place, a trust for the benefit of the Wichitas and other tribes whom the United States had placed there prior to 1866, which trust arose from the fact that as the only right of the United States prior to 1866 to locate Indians in the leased district was acquired for their *permanent* settlement, the United States could not afterwards use its subsequently acquired absolute title in

order to dispossess them. Secondly, as to Indians settled on the land after the cession, the Secretary meant that such settlement had been practically a declaration of trust in their favor. They were given a right of permanent and exclusive settlement on so much of the land as was included in their respective reservations. Whether the Secretary also held that the Choctaws and Chickasaws had a reversionary interest in the land (a point on which he was silent) is purely a matter of speculation. If he did, then he had not studied out the matter carefully. He was not a party to the treaty of 1866, and his knowledge of its provisions was not acquired at the time it was made. To set up his supposed opinion, thought to be implied in a statement made thirteen years after the treaty, as evidence that a provision of the treaty meant something that it did not express, would be simply preposterous.

(4.) President Hayes's proclamation of February 12, 1880, in regard to the Indian Territory. (21 Stat., 798.) This stated the purposes for which the United States at that time held the Indian Territory, and that the lands were not open to settlement. It in no way undertook to define the rights either of the United States or the Indians in regard to the Territory or any portion of it. It is undeniable that the "leased district" was then held for Indian settlement, all of it being then used for the purpose except Greer County, which was supposed to belong to Texas, but this undeniable fact does not mean that any Indians had rights in the district except those settled thereon. The same remarks apply to President Arthur's proclamation of July 1, 1884. (23 Stat., 835.)

(5.) The report of the Acting Commissioner of the Land Office of April 25, 1881 (Sen. Ex. Doc. No. 111, Forty-seventh Congress, first session, p. 2–4), containing the following statements:

> The lands to which the United States holds the legal title within the Indian Territory are reserved lands by treaty stipulations and acts of Congress, and are not, and never have been, public lands subject to general occupation.
>
> * * * * *
>
> The treaties by which the United States reacquired title to any of the lands in the Indian Territory, or obtained the conditional right to control the disposal of any of said lands, were treaties with the Seminoles of March 21, 1866; with the Choctaws and Chickasaws of April 28, 1866; with the Creeks of June 14, 1866; and with the Cherokees of July 19, 1866.
>
> * * * * *
>
> The Choctaw and Chickasaw cession of April 28, 1866 (14th Stats., 769), was by the tenth section thereof made subject to the conditions of the compact of June 22, 1855 (11th Stat., 613), by the ninth article of which it was stipulated that the lands should be appropriated for the permanent settlement of such tribes or bands of Indians as the United States might desire to locate thereon.
>
> The lands embraced in the Choctaw and Chickasaw cession were also included in a definite district established by the stipulations of the treaty of 1855, pursuant to the act of Congress of May 28, 1830, the United States reengaging by the seventh article of said treaty to remove and keep out from that district all intruders.
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> The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and is not within the lawful power of either the legislative or executive departments of the Government to annihilate such trusts, or to avoid the obligations arising thereunder.
>
> Such trusts are for the benefit of Indian tribes and Indian freedmen.

As regards the statement that Article X of the treaty of 1866 subjected the cession of the previously leased district to the conditions of the compact of the treaty of 1855, it has been shown above that there is nothing in the language of that article to suggest any such effect, much less to require it; and the opinion of an officer of the Land Office, expressed fifteen years after the date of an Indian treaty, as to what had been intended by that treaty, does not seem entitled to any extraordinary weight. As to the statement that the lands were "subject to specific trusts," the Acting Commissioner was evidently considering exclusively the obligations to the Indians or Indian freedmen then occupying the land, and it does not appear that he meant to indicate that the Choctaws and Chickasaws retained any title to or interest in the leased district.

(6.) The statement of the Secretary of the Interior, February 14, 1884, that "those lands" (i. e., all the lands in the Indian Territory to which the United States had title) "were acquired * * * to be held for Indian purposes, and to some extent for the settlement of the former slaves of some of said nations." (Sen. Ex. Doc. No. 109, Forty-eighth Congress, first session, p. 1.) This relates merely to the objects which the

Government had in view in acquiring the lands in the Indian Territorry other than those occupied by the Five Civilized Tribes, and has no bearing whatever upon the consequences of a future change of policy as to the disposition of those lands.

(7.) The statements in the reports of Commissioner Price, of January 26, 1885 (Sen. Ex. Doc. No. 50, Forty-eighth Congress, second session, p. 20), and of Acting Commissioner Belt, of September 13, 1890, (H. Rept. No. 3147, Fifty-first Congress, first session). The former merely quotes Secretary Schurz's statement of May 1, 1879, which has already been referred to and explained above. The latter accompanied the Choctaw and Chickasaw memorial of 1890 (referred to above in connection with the act of March 3, 1891, § 15), but did not attempt to correct a single one of the many misstatements of that paper. Evidently the Acting Commissioner accepted all the promises of the memorial, without ever seeking to verify them, and was thus led to accept the conclusions also; yet even then his acquiescence was given hesitatingly, and against his better judgment, for he admitted that the cession of 1866 might, after all, have been intended to be absolute. Had he studied out the matter for himself, instead of accepting the memorial as gospel truth, he would probably have seen reason to believe that the words of cession meant just what they said, and did not need to be qualified or explained away.

(8.) The statement of Secretary Vilas, of February 18, 1889, in regard to the cession by the Seminoles. (Sen. Ex. Doc. No. 122, Fiftieth Congress, second session.) The Seminole treaty, as already shown above, expressly

recited the purpose of the cession, and to construe the cession as intended to be made for that purpose only, in other words, to give the recital the effect of a condition, was plainly in accordance with the rule requiring all parts of a treaty to be construed with reference to each other. The construction given to the Seminole cession is no precedent whatever for a construction of the cession of the "leased district," the latter having been made without any qualifying recital whatever.

The opinion of the court below undertakes to find in the various statements above quoted a "continuous executive and legislative construction" (the departmental construction being also found to be "nearly contemporaneous with the execution of the treaty itself") to the effect that the cession of the "leased district" in 1866 was in trust for the permanent settlement of the friendly tribes in Kansas and elsewhere, which construction is evidently regarded as of great weight in the interpretation of the language of the cession, so that the contrary opinion of Secretary Noble, that the cession "gave an absolute title to the United States" (letter of May 6, 1891, Sen. Ex. Doc. No. 42, Fifty-second Congress, first session, p. 18), may fairly be disregarded. It is submitted that these statements are very far from being as unequivocal and consistent as the opinion supposes, and that in so far as they are contrary to the statement of Secretary Noble in 1891, their weight is certainly no greater than that of that statement.

If the statements relied on by the court below be analyzed, their purport will be found to be as follows:

One statement that the United States had a right to

locate other Indian tribes in the "leased district," a statement in no way inconsistent with the possession of an absolute title. (Delaware Treaty, 1866.)

Two statements that the "leased district" was held for the purposes of Indian settlement (proclamations of 1880 and 1884), both statements being made at a time when all the land which was believed to be within that district was actually in use for that purpose, a fact in no way inconsistent with an absolute title as regards the Choctaws and Chickasaws.

One statement that the object of the United States in purchasing the "leased district" was to use it for Indian purposes (Secretary Teller, 1884), a statement not inconsistent with an absolute title as against the vendors.

Two statements that the cession of the "leased district," while substituting a direct purchase for a lease, had not altered "the trust" (Secretary Schurz, 1879; Commissioner Price, 1885), statements which are most fairly understood as referring exclusively to a trust in favor of the Indians who had been settled on the land, and having its origin in such settlement only.

One statement in regard to the dissimilar language of the Seminole treaty (Secretary Vilas, 1889), such statement not having been made with reference to the cession of the "leased district," nor having the remotest connection therewith.

One statement that the "leased district" was subject to specific trusts and that the title thereto was subject to the provisions of Article X of the treaty of 1866. (Acting Commissioner Holcomb, 1881.) The "trusts" may most fairly be understood as trusts in favor of the Indians

settled thereon, trusts not inconsistent with an absolute title as against the Choctaws and Chickasaws; while the view as to the bearing of Article X is not called for by the language of that or any other article of the treaty.

One admission of reversionary rights in the Choctaws and Chickasaws (Acting Commissioner Belt, 1890), a hesitating admission, apparently induced by overreliance on an *ex parte* memorial.

Of all the statements relied on in the opinion of the court below, therefore, two only contain anything really inconsistent with an absolute cession by the Choctaws and Chickasaws in 1866. One of these, made in 1881, fifteen years after the cession, merely assumes that the cession was subject to the provisions of Article X, but makes no attempt to support the assumption by evidence or argument. The other, made in 1890, twenty-four years after the cession, is too closely connected with the Choctaw and Chickasaw memorial to carry weight as expression of independent judgment. Both statements were made by subordinates, acting in the absence of the real heads of their bureaus, and the later one was dissented from by the head of the Department. It is submitted that there is no such "continuous executive and legislative construction of the objects of the treaty," in support of a conditional cession, as the learned judge has supposed. That neither the Choctaws nor the Chickasaws ever put forward, prior to about 1890, their present claim of a reversionary interest on the termination of a supposed trust has been already shown above. The evidence of a supposed contemporaneous understanding, on both sides or on either, that the cession was not absolute, is simply nonexistent.

III.

IF THE CESSION OF 1866 WAS IN TRUST, THAT TRUST WAS FOR PERMANENT SETTLEMENT OF FRIENDLY TRIBES, AND THE TRIBES SETTLED IN THE CEDED DISTRICT ACQUIRED THE USUAL INDIAN TITLE TO THE LANDS OCCUPIED BY THEM, SO THAT THE ALLOTMENT OF A PORTION OF THE LAND WITHIN THE WICHITA RESERVATION AMONG THE INDIANS SETTLED THEREON, AND THE SALE OF THE BALANCE FOR THEIR BENEFIT, WOULD NOT VIOLATE THE TRUST. (See the eighth assignment of error.)

The rights of the cestuis que trustent not defined by the court below.

Even if it be conceded, for the sake of the argument, that the cession of 1866, though absolute in its terms, was in trust, it does not at all follow that the court below rightly apprehended the nature of that trust, or that the decree is calculated to properly enforce the terms of the trust. As to the nature of the trust the court below says very little, at least as regards the rights of the *cestuis que trustent*, the most important thing about the trust, in the eyes of the court, being evidently the rights of those who had ceded the land in trust, and who had a reversionary interest therein, in case the purposes of the trust should be abandoned. This is a serious departure from the usual position of a court of equity, in which the interests of the *cestuis que trustent* are held to be of primary importance, the possible reversionary interests of the creator of the trust being wholly subordinated to them.

The court below holds that the cession of 1866 entitled the United States "to settle Indians permanently on the lands mentioned in the agreement" (meaning, presumably, the third article of the treaty), but does not undertake to define the rights acquired by Indians so settled. It "can not say that the allotment of 160 acres to each one of the defendant Indians is unreasonable in the establishment of the Wichitas and the affiliated bands as permanent settlers" (Rec., 428), and the decree confirms this allotment; but nothing is said to show whether a larger allotment might not have been upheld had the Wichita agreement of 1891 provided for it, and the inference is that such an allotment might also have been found to be not unreasonable. The Choctaws and Chickasaws, on the other hand, deny that the Wichita and affiliated bands are entitled to any allotments whatever, and they have taken a cross appeal, assigning for error that portion of the decree which sustains this very modest provision for the Indians now on the reservation. It will therefore be necessary to consider whether this portion of the decree was warranted by the supposed trust, as well as whether that trust necessarily limits the disposition of the land and its proceeds to that ordered by the decree.

The trust was for the permanent settlement of friendly tribes.

The first point to determine is the nature of the trust. The first document which throws light on its character is the treaty of 1855, by which the district was "leased"

o the United States "for the permanent settlement" of Indians from a certain region, "which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however*, The territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore." The "rights and interests of the Choctaws and Chickasaws," here referred to, must have meant their right of settlement, their interest in the land as settlers or possible settlers, and all civil and political rights and interests of such of them as might settle on the land, and of the government of the Choctaw Nation in regard to them. Such rights and interests could not, of course, extend to any land in actual use for the permanent settlement of Indians placed there by the United States, the "exclusive control" of the United States over such Indians necessarily extending to the land actually occupied by them.

Although the treaty uses the word lease, there was certainly no lease in the ordinary sense of the term. A lease for "permanent settlement" is a permanent lease, entitling the lessee to use the premises permanently, and where, as in the present case, a gross sum is paid for the lease, and not a periodical rental, the only possible condition of reentry would be the lessee's use of the premises for other purposes than such permanent settlement. Whether such a conveyance is really a lease at all is not material, because in 1866, on payment of a new consideration, a cession was substituted.

The next document is the fifth stipulation, providing that the land should be "set apart for the friendly tribes now in Kansas and elsewhere," or, as stated in the annual report of the Indian Commissioner, "set apart to be purchased for the use of such Indians, from Kansas or elsewhere, as the Government may desire to colonize therein."

The proposed treaty of 1865 does not throw any light on the matter, as that treaty provided for applying the fifth stipulation to the country east of the leased district, and for continuing the lease, merely removing all restrictions upon the character of the tribes who could be settled on the land.

If the cession of 1866 was made, as the court below holds, in pursuance of the fifth stipulation of 1865, then it was undoubtedly for the settlement or colonization of Indians, "the friendly tribes now in Kansas and elsewhere," and such settlement or colonization was intended to be permanent, as had been intended under the lease. The cession was, in the language of Secretary Schurz, "a direct purchase," in trust, for the permanent settlement of such Indians, and necessarily terminated all rights of settlement and other rights and interests of the Choctaws and Chickasaws in the district, except only reversionary rights contingent on a breach or termination of the trust.

The words "permanent settlement" mean the usual Indian right of occupancy.

The trust being for the permanent settlement of these Indians, it remains to inquire what is meant by "permanent settlement."

It is settled law that from and after the extension of the sovereignty of the United States, or of Great Britain, or of any of the nations from whom the United States obtained land by treaty, over any part of this continent, the Indians occupying lands in such part of the continent held such lands by virtue of such occupancy, having the right to the exclusive enjoyment of these lands, including hunting grounds, in their own way, and for their own purposes, until they abandoned them, or made a cession to the Government, or an authorized sale to individuals. (*Cherokee Nation* v. *Georgia*, 5 Pet., 1, 17; *Mitchel* v. *United States*, 9 Pet., 711, 746.) In conformity with this view of the law, it has been the invariable practice of the United States, in either acknowledging the right of Indian tribes to the lands on which they were found, or in granting land to them, to acknowledge the existence of or to grant, as the case may be, an estate of this character, i. e., an exclusive right of enjoyment during occupancy, but no right of alienation except to the United States or by its authority. The act of May 25, 1830, sec. 3 (4 Stats., 411), provided that grants made to Indians in exchange for other lands should always convey a title of this character.

The various treaties differ considerably in the words used to grant or describe such an estate, but that the estate contemplated by them was, in all cases, of this one character there can be no doubt. The variety of wording may be seen by a reference to some of the treaties, as follows:

> "The United States allot all the lands contained within the said lines to the Wiandot and Delaware

nations, to live and to hunt on." (*Wiandot*, etc., treaty of 1785, 7 Stats., 17; see also *Choctaw* treaty of 1786, id., 21; *Chickasaw* treaty, id., 25; *Shawnee* treaty, id., 27. The *Wyandot* treaty of 1789, id., 29, contains the same language with an express prohibition on alienation except to the United States.)

"The United States solemnly guarantee to the Creek Nation all their lands within the limits of the United States westward and southward of the boundary described." (*Creek* treaty of 1790, 7 Stats., 36; see also *Cherokee* treaty of 1791, id., 40; *Creek* treaty of 1814, id., 124; *Kickapoo* treaty of 1819, id., 201; *Florida* treaty of 1823, id., 224; *Cherokee* treaty of 1828, id., 311; *Miami* treaty of 1838, id., 569; *Creek* and *Seminole* treaty of 1856, 11 Stats., 700.)

"The Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States." (*Wyandot* treaty of 1795, 7 Stats., 52; see also *Sac* and *Fox* treaty of 1804, id., 85.)

"The United States will in future consider the Delawares as the rightful owners of all the country which is bounded," etc. (*Delaware* treaty of 1804, 7 Stats., 82.)

"The said Wyandott Indians and their descendants shall hold the land so long as they or their descendants shall occupy the same." (*Wyandot* treaty of 1818, 7 Stats., 181; see also *Osage* treaty of 1825, id., 240; *Seneca* and *Shawnee* treaty of 1832, id., 412.)

"The commissioners of the United States, in behalf of said States, do hereby cede to said nation a

tract of country," etc. (*Choctaw* treaty of 1820, 7 Stats., 211; see also *Shawnee* treaty of 1825, id., 284.)

"In fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it." (*Choctaw* treaty of 1830, 7 Stats., 333; see also *Seneca* treaty of 1831, id., 349; *Seneca* and *Shawnee* treaty of 1831, id., 352; *Shawnee* treaty of 1831, id., 356; *Ottawa* treaty of 1831, id., 360; *Kaskaskia* and *Peoria* treaty of 1832, id., 404; *Creek* treaty of 1833, id., 419; *Quapaw* treaty of 1833, id., 425.)

"They holding it by the same title and in the same manner that other Indian titles are held." (*Sac* and *Fox* treaty of 1830, 7 Stats., 330; see also *Winnebago* treaty of 1832, id., 371; *Chippewa*, etc., treaty of 1833, id., 431; *Sioux* treaty of 1851, 10 Stats., 949; *Sioux* treaty of 1851, id., 954; *Menomonee* treaty of 1854, id., 1064.)

"As their home, to be held as *all* Indians' lands are held." (*Winnebago* treaty of 1846, 9 Stats., 878; see also *Menomonee* treaty of 1848, 9 Stats., 952; *Otoe* and *Missouria* treaty of 1854, 10 Stats., 1038; *Omaha* treaty of 1854, id., 1043; *Miami* treaty of 1854, id., 1093; *Ponca* treaty of 1858, 12 Stats., 997.)

Besides such phrases as the above, the word "permanent" is frequently used in describing Indian titles, especially toward the year when the "leased district" was acquired by the United States. For instance:

> "Shall be conveyed and forever secured by the United States to the said Delaware Nation as their *permanent* residence." (*Delaware* treaty of 1829, 7 Stats., 327.)
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> "As their *permanent* place of residence as long as they remain a tribe." (*Kickapoo* treaty of 1832, 7 Stats., 391.)

"The United States cede to the Piankeshaw and Wea tribes for their *permanent* residence." (*Piankeshaw*, etc., treaty of 1832, 7 Stats., 410.)

"For a *permanent* home on which they can settle." (*Ioway*, etc., treaty of 1836, 7 Stats., 512.)

"Until they shall procure a *permanent* settlement." (*Winnebago* treaty of 1837, 7 Stats., 545.) In this instance the permanent settlement was to be upon land granted to be held "by the same title and in the same manner that other Indian titles are held."

"As a *permanent* home for all the New York Indians." (*N. Y. Indians* treaty of 1838, 7 Stats., 551.)

"For a *permanent* and perpetual residence for them and their descendants." (*Sac* and *Fox* treaty of 1842, 7 Stats., 596.)

"The aforesaid tribe shall be allowed to occupy temporarily that portion of the above-described tract, * * * * it being understood that this described tract of land shall be deemed and considered an Indian reserve, until a suitable selection shall be made by the direction of the President of the United States for their *permanent* residence." (*Rogue River* treaty of 1853, 10 Stats., 1018; *Cow Creek* treaty of 1853, id., 1027; see also *Molel* treaty of 1855, 12 Stats., 981.)

"At any time hereafter when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their *permanent* home to be surveyed * * * and may assign such portion to each person or family as shall be designated by the principal men of the tribe." (*Delaware* treaty of 1854, 10 Stats., 1050; see also *Willamette* treaty of 1855, id., 1145.)

"There shall be, and hereby is, reserved and set apart a sufficient quantity of land for the *permanent*

homes of the said Indians." (*Chippewa* treaty of 1855, 10 Stats., 1165; see also *Winnebago* treaty of 1855, id., 1172.)

"The President * * * may further at his discretion cause the whole or any portion of the lands hereby reserved * * * to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege and will locate on the same as a *permanent* home." (*Dwamish* treaty of 1855, 12 Stats., 927; see also *S'Klallams* treaty, id., 933; *Makah* treaty, id., 939; *Walla Walla* treaty, id., 945; *Yakama* treaty, id., 951; *Nez Percé* treaty, id., 957; *Middle Oregon* treaty, id., 963 *Qui-nai-elt* treaty, id., 971; *Flathead* treaty, id., 975; *Nez Percé* treaty of 1863, 14 Stats., 647.)

The treaties above referred to, taken in connection with the decisions already cited, and the act of 1830, show conclusively that down to the time when the trust, which the court below has held exists in the present case, was created, while there was no one form of language used to describe the nature of the estate granted to Indian tribes, there was but one species of such estate, and further that the words "permanent residence," "permanent home," "permanent settlement," and the like, were frequently used in reference to precisely this character of estate. In the case of the treaty with the New York Indians, where the words "permanent home" were used, this court recently decided that the estate granted was such that even a forfeiture could not be enforced by Executive action, and that where the land had been sold by Executive order the proceeds of sale must be paid to the Indians. (*New York Indians* v. *United States*, 170 U. S., 1.)

The Indian right of occupancy in any particular land confined to one tribe, band, or confederacy.

In every case of the settlement of Indians on land under the treaties above referred to, and apparently in every other instance of such settlement, the Indians so settled, whether a tribe, band, or confederacy, were given a perfect Indian title, free from all conflicting or limiting interests on the part of other Indians. In the case of the intertribal treaties between the Menomonees and the New York Indians (Sen. Doc. 189, Twenty-seventh Congress, second session) the grantees acquired an interest in common with the grantors, an interest such as they would have had if both parties had belonged to one tribe or confederacy; but even that arrangement, though giving to neither party any controlling interest as against the other, had to be abandoned (see the Menomonee treaties of 1831 and 1832, 7 Stats., 342, 405), and the practically invariable rule was that but one tribe or confederation had any interest whatever in any particular land, and that interest was an Indian right of permanent occupancy. The right to hunt and trap in "the Great Prairie west of the Cross Timber," shared in common by the Comanches, Wichita and affiliated bands, Cherokees, Muscogees, Choctaws, Osages, Quapaws, Kiowas, Katakas, and Tawakaros under the treaties of 1835 and 1837 (7 Stats., 474, 533) is scarcely an exception to the rule, as it involved no right of occupancy, and was of course intended to cease as to any of the tribes (except those whose reservations extended into the Great Prairie) whenever it

should be thought best to confine such tribe to a particular reservation.

This rule was dictated by the most obvious expediency. Different tribes might possibly occupy a reservation in common without disputes arising between them, but to have made the rights and interests of one tribe at all subordinate to those of another would have resulted in very serious complications.

No departure from this rule can be found even in the case of the cessions for the special purpose of Indian settlement, made by the Creek treaty of June 14, 1866, or the Seminole treaty of March 21, 1866 (14 Stats., 786, 756). As has been already seen above, whatever portion of the land so ceded was actually appropriated for the settlement of Indians was retained by the Indians settled thereon, and no further payment was made to the Creeks or Seminoles on account of such land. The land for which they received additional compensation under the acts of March 1, 1889, and March 2, 1889 (25 Stats., 757, 1004), was merely what had not been actually appropriated to Indian settlement.

The trust contemplated the acquisition of the usual Indian right of occupancy.

Accordingly, when the United States, in 1855, "leased" of the Choctaws and Chickasaws a district for the permanent settlement of the Indians from a certain region, subject to a right of settlement by the Choctaws and Chickasaws, who were to remain under the Choctaw government, it is not to be supposed that the rights of such Indians

as were placed thereon for permanent settlement were in any way new, or abnormal, or different from the rights of any other Indians in the lands occupied by them. There is nothing whatever to indicate that the United States had adopted, even by way of experiment, any new Indian policy, different from that previously pursued, and in fact the familiar and almost technical words "permanent settlement" exclude the possibility of such an idea. These words, or the equivalent words "permanent home," "permanent residence," etc., had been repeatedly used in treaties in reference to an Indian right of occupancy, sometimes described as an estate in fee simple, subject to a reversion on abandonment or the tribes becoming extinct. *A fortiori* when the United States in 1866, for a further consideration, procured a cession of the previously leased district for the permanent settlement of friendly tribes in Kansas or elsewhere, the title of such tribes as were settled on the district was the same Indian title. The words "permanent settlement" meant as to them precisely what these or similar words had always meant, and in point of fact nothing less than an Indian right of occupancy could properly be described as a "permanent settlement." The difference between the "lease" and the cession was that under the former the Choctaws and Chickasaws had a right of settlement in the district, and such of them as settled there would continue to be under their own government, while under the latter, the "direct purchase," as Secretary Schurz called it, they had no such right. This is the only difference that can be pointed out between the lease and the cession, if the theory of a trust be maintained. The title of such Indians as the

Government placed in the district was as valid and as permanent under the lease as under the cession.[1]

The Indian right of occupancy includes a right to allotments in severalty and to the proceeds of sales of unallotted lands.

While an Indian right of occupancy involves a limited right of alienation only, viz, to the United States or with its approval, this latter right has always been recognized as a substantial one, so that practically in all cases except

[1] The words of the Choctaw delegation in their letter of April 24, 1855, "We can not consent to the sale or alienation beyond our ultimate control of one foot of our country. It would be death to us or to any Choctaw who should propose or assent to it," occur in a discussion of the proposed concession by them of "a complete and unincumbered title to that portion of the Choctaw country embraced in the Chickasaw district," and these words were used solely in reference to that proposed concession. It can not be assumed that the delegation would have used similar language in regard to that "limited portion of the western part of our country," as to which they had said that they were willing that "the Government shall have the permanent use" of it, and which was ultimately leased. (See Sen. Mis. Doc. No. 31, Thirty-fourth Congress, first session p. 60.) An agreement for the permanent use of land by another party, even if for a specified purpose, places the land beyond the "ultimate control" of the owner, at least as long as the purpose is carried out. Still, under the terms of the "lease" as ultimately agreed upon, the Choctaws were allowed complete control over so much of the "leased district" as the Government did not actually use, so that the possibility of holding the above declaration of the Choctaws applicable to that district became unimportant. In 1866, at all events, no such declaration was made, and while the cession may have been only for the permanent settlement of Indians, there can be no doubt that all "ultimate control" by the Choctaws or Chickasaws ceased as to at least so much of the country as was actually used for such permanent settlement.

where a cession of territory has been required of Indians as an indemnity for expense or losses caused by them, a consideration has always been given them whenever they have relinquished any part of their lands to the Government; and in many cases it has been provided that the entire net proceeds of the lands ceded, less the amount of certain expenses incurred by the United States for their benefit, should be paid over to them, or held in trust for them. Moreover, it has long been the established practice that when a tribe or several of its members have progressed so far in civilization as to outgrow the tribal system of land ownership, a sufficient portion of the tribal land should be allotted among all or a portion of the members of the tribe, as the case might be, in severalty, each allotment to be held by the allottee in fee simple, though usually with a temporary restraint upon alienation, and also that when such allotments are made to all the members of a tribe, any land remaining, over and above what is required for the allotment, should be sold for the benefit of the tribe, subject to the usual reservations of land for schools and public purposes. In several instances citizenship has also been provided for, but the provision for ownership in severalty is much more frequently found than that for admission to citizenship. The first instance of this method of dealing with Indian lands seems to be found in article 8 of the Cherokee treaty of July 8, 1817 (7 Stats., 159), providing that every head of any Indian family who might wish to become a citizen of the United States should receive a life estate in 640 acres, with a reversion in fee simple to his children and a reservation of

dower to his widow. If any such head of a family removed from the land which he had received, it was to revert to the United States, but no restriction was placed on alienation by his children after his death. Other instances of the substitution of several ownership of land in fee simple, usually with a prohibition of alienation without the President's approval, for tribal ownership are found in the following treaties and statutes:

Miami treaty of October 6, 1818, articles 3 and 6. (7 Stats., 190.)

Cherokee treaty of February 27, 1819, article 3. (Id., 196.) This was supplementary to the treaty of July 8, 1817, already mentioned, and it provided, *inter alia*, for a declaration of an "intention to continue to reside permanently on the land reserved," thus showing that "permanent" residence was understood to mean a title in fee simple, conditioned on actual occupancy by the first owner during his lifetime.

Chippewa treaty of September 24, 1819, article 3. (Id., 204.)

Choctaw treaty of October 18, 1820, articles 4 and 9. (Id., 211, 212.)

Ottawa, *Chippewa*, and *Pottawatomie* treaty of August 29, 1821, article 3. (Id., 219.)

Quapaw treaty of November 15, 1824, article 7. (Id., 233.)

Choctaw treaty of January 20, 1825, article 4. (Id., 235.)

Osage treaty of June 2, 1825, article 5. (Id., 241.) Article 6 also provides for the sale of 54 tracts of a mile

square each for the purpose of raising a school fund for the Osages.

Kansas treaty of June 3, 1825, article 6. (Id., 245.)

Chippewa treaty of August 5, 1826, article 4. (Id., 291.)

Pottawatomie treaty of October 16, 1826, article 6. (Id., 297.)

Miami treaty of October 23, 1826, article 3. (Id., 300.)

Pottawatomie treaty of September 20, 1828, article 3. (Id., 318.)

Chippewa, *Ottawa*, and *Pottawatomie* treaty of July 29, 1829, Article IV. (Id., 321.)

Winnebago treaty of August 1, 1829, Article V. (Id., 324.)

Choctaw treaty of September 27, 1830, Article XIV. (Id., 335.) Grants in fee simple were to issue after residence upon the land to be granted for five years after the ratification of the treaty, coupled with an intention to become a citizen of the United States.

Pottawatomie treaty of October 27, 1832, Article III. (Id., 400.)

Chickasaw treaty of May 24, 1834, Article VI. (Id., 452.)

Miami treaty of October 23, 1834, Article III. (Id., 463.)

Cherokee treaty of May 23, 1836, articles 12 and 13. (Id., 483.) Citizenship was also provided for in this case. Owing to the determination of President Jackson that all the Cherokees should leave Georgia, these provisions for ownership in severalty were declared void by supplementary articles, but the rights so relinquished

were made the subject of further compensation to the Indians. (Id., 488.)

Miami treaty of November 3, 1838, article 12. (Id., 571.)

Act of March 3, 1839 (5 Stats., 349). Under this act the entire Brothertown Reservation in Wisconsin was divided among the individual Indians in severalty and they were admitted to citizenship.

Act of March 3, 1843 (Id., 645). This act provided for a similar division of a township in Wisconsin, occupied by the Stockbridge Indians, and for their admission to citizenship. It was repealed by the act of August 6, 1846 (9 Stats., 55), and the division in severalty was ordered to be made in a portion of the township only. By the treaty of November 24, 1848 (id., 955), the township was sold to the United States, but the allotments in severalty, made under the act of 1843, were to stand.

The treaty of February 5, 1856 (11 Stats., 663), made some changes in the disposition of the land, but similarly provided for allotments in severalty to those who wished them. Subsequently, a portion of the tribe having removed to another reservation, the act of March 3, 1865, §4 (13 Stats., 562), provided that any of the chiefs, warriors, or heads of families might enter a homestead under the homestead laws, and that all abandoned lands on the reservation should be sold for the benefit of such of the Indians as settled on the homesteads, who might also become citizens under certain conditions.

Wyandot treaty of April 1, 1850, Articles VI–X. (9 Stats., 990; see also treaty of 1855, 10 Stats., 1159.)

Sac and *Fox* treaty of May 18, 1854, article 3. (10 Stats., 1075.) Here the time and extent of the allotment were in the discretion of the President. A similar provision is found in the *Kickapoo* treaty of 1854 (id., 1079), *Kaskaskia, etc.*, treaty of 1854 (id., 1083), *Miami* treaty of 1854 (id., 1095), *Chippewa* treaty of 1854 (id., 1110), *Willamette* treaty of 1855 (id., 1145).

Ottawa and *Chippewa* treaty of July 31, 1855, Article I. (11 Stats., 622.)

Chippewa treaty of August 2, 1855. Article 1. (Id., 633.)

Mendawakaton, etc., Sioux treaty of June 19, 1858, Article I. (12 Stats., 1032.)

Sisseton, etc., Sioux treaty of June 19, 1858, Article I. (Id., 1037.)

Winnebago treaty of April 15, 1859, Articles I and II. (Id., 1101.)

Swan Creek, etc., treaty of July 16, 1859, Articles I and II. (Id., 1105.)

Kansas treaty of October 5, 1859, Articles I–IV. (Id., 1111.)

Delaware treaty of May 30, 1860, Articles I and II. (Id., 1129.)

Arapahoe, etc., treaty of February 18, 1861, Articles 2 and 3. (Id., 1164.)

Pottawatomie treaty of November 15, 1861, Articles I–IV (Id., 1191).

Ottawa treaty of June 24, 1862 (Id., 1237).

Kickapoo treaty of June 28, 1862, Articles I–IV (13 Stats., 623).

The above treaties and statutes show clearly enough
he established practice of ultimately changing the Indian
tle by occupancy (or, as some of the treaties express it,
heir right to a "permanent home," or "permanent res-
dence") into a fee simple title in severalty,[1] and also of
urchasing outright, or selling for the Indians' benefit,
he lands not allotted to them in severalty, so that the
"Dawes Act" of February 8, 1887 (24 Stats., 388), intro-
duced no new policy, but merely provided for carrying
ut the old-established policy by means of a uniform sys-
em, applicable to all cases. When, therefore, the United
States acquired, in 1855, the right to use the "leased
district" for the permanent settlement of Indians, in com-
non with the Choctaws and Chickasaws, and when, in
1866, that district was ceded to the United States for the
exclusive permanent settlement of Indians (assuming the
cession not to have been absolute), it is manifest that it
was intended and expected from the first that all Indians
permanently settled on the land should have the same
right to allotments in fee simple in severalty that had
always been recognized as belonging to all other perma-
nently settled Indians whenever their progress in civil-
ization warranted it; and also the same beneficial interest
in the unallotted portion of so much of the "leased dis-
trict" as had been set apart for their permanent settle-
ment as all other Indians had in their reservations. The

[1] Some idea of the extent of this practice may be obtained from the fact that the Census of 1890 (Indians, p. 28) reports 58,806 Indians who were citizens of the United States. As allotments of land in severalty were not always accompanied by citizenship, the number of Indians who had from time to time received such allotments must have been still greater.

words "permanent settlement" must have been un
stood to mean this, or their use was utterly anoma
and little less than a mockery. There is nothing w
ever to sustain the latter alternative.

*The Wichita and affiliated bands were given their res
tion for their permanent settlement, with the right to
ments in severalty, and to the proceeds of sales of unall
lands.*

When the Wichita and affiliated bands were first pl
on the "leased district," in 1859, two small reservat
containing together 154,240 acres, within the limi
the present Wichita Reservation, were given to t
and they were also allowed to hunt on any land wi
the district not yet specifically assigned to other Ind
During the rebellion they were driven into Kansa
the Choctaws and Chickasaws, but returned in Au
1867. They returned to the same general region w
they had previously occupied, but it does not appear
their occupancy was limited to the two small reserva
laid out in 1859. A southern boundary, the Wa
River, was established by the Kiowa and Comanche tr
of October 21, 1867 (15 Stats., 581), while a we
boundary, the meridian of 98° 40′, was establishe
the setting off of the Cheyenne and Arapahoe Reserva
by the Executive order of August 10, 1869. This
the Wichita and affiliated bands in a tract of 743
acres, bounded by the Canadian and Washita rivers
the meridians of 98° and 98° 40′, and in 1872 certai
their chiefs and delegates entered into the following ag
ment with the Commissioner of Indian Affairs:

Articles of agreement made and concluded at Washington City, District of Columbia, this nineteenth day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, head men, and members of the Wichitas and affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:

ARTICLE 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river, to the line of 98° 40′ W. L., thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the 98th meridian, thence due south to the place of beginning.

ARTICLE 2. In consideration of the reservation provided for in the preceding article the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest, or claim of any nature whatsoever, in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States.

In his annual report for 1872 the Commissioner of Indian Affairs (p. 101) recommended the ratification of this agreement, but no action was taken by Congress upon this recommendation. Since the date of the agreement, however, the boundaries therein named have been officially maintained as those of the Wichita Reservation.

(Sen. Ex. Doc. No. 13, Forty-eighth Congress, first session, pp. 3, 56.)

As will be shown in the argument on the appeal of the Wichita and affiliated bands, the quitclaim in article 2 did not relate to any particular lands, and in fact its object was merely to prevent these Indians from thereafter asserting any pretensions to land outside the reservation. As the court below rightly holds, these Indians had no real claim to any other land, and in fact "paid nothing, either in money or in land as the equivalent of money" (Rec. 383), for the land given to them by this agreement. The agreement simply gave to these Indians "for a home" a tract of land which they had already been allowed to occupy, without any definite agreement, for thirteen years; and while it has never been formally ratified by Congress, and the Indians have, more or less informally, denied the authority of the chiefs and delegates who executed it, it has in point of fact been practically adopted and carried out by both sides ever since. The appropriation acts from 1873 to 1891, inclusive, all contain an appropriation "for subsistence of the Arapahoe, Cheyenne, Apache, Kiowa, Comanche, and Wichita Indians, and transportation of the same, who have been collected upon *the reservations set apart for their use and occupation.*" (Acts of Feb. 14, 1873, § 1, 17 Stats., 449; June 22, 1874, § 1, 18 Stats., 149; Mar. 3, 1875, § 1, id., 423; Aug. 15, 1876, § 1, 19 Stats., 195; Mar. 3, 1877, § 1, id., 290; May 27, 1878, § 1, 20 Stats., 84; Feb. 17, 1879, § 1, id., 33; May 11, 1880, § 1, 21 Stats., 128; Mar. 3, 1880, § 1, id., 498; May 17, 1882, § 1, 22 Stats.,

82; Mar. 1, 1883, § 1, id., 445; July 4, 1884, § 1, 23 Stats., 89; May 3, 1885, § 1, id., 377; May 15, 1886, § 1, 24 Stats., 41; Mar. 2, 1887, § 1, id., 460; June 29, 1888, § 1, 25 Stats., 330; Mar. 2, 1889, § 1, id., 994; Aug. 19, 1890, § 1, 26 Stats., 350; Mar. 3, 1891, § 1, id., 1004.)

The above statutes all declaring that the Wichitas (a term used, of course, to include the affiliated bands) had been collected upon a reservation "set apart for their use and occupation," and the only such reservation being that described in the agreement of 1872, it is evident that Congress recognized that reservation as the one upon which they had been given permanent settlement, and the rights accruing from such settlement.

As the Choctaws and Chickasaws were not parties to this agreement of 1872, of course it could not, even if adopted or ratified by Congress, have affected any of their rights. As regards them it is only of value as evidence that the United States gave to the Wichita and affiliated bands a particular tract of country "for a home," and the only question that can arise is whether this gift was in accordance with a trust for their "permanent settlement." Whether the gift was formal or informal, evidenced by an agreement or not, are immaterial questions in this connection. It is indisputable that the United States originally placed these Indians on a portion of this tract; that it subsequently permitted them to occupy the whole of it, and that in consequence the tract was treated by both parties as given to the Indians "for a home." As against the Choctaws and Chickasaws the

fact of the gift is sufficiently established, and wha
disposition may be made of that land, by virtue of
gift, must stand, unless it is in violation of the trus

The trust was for "the permanent settlement" of
such Indians as these, and there can be no doubt tha
gift was intended to be for their permanent settle
In the official correspondence and reports in rega
the original placing of these Indians on a portion o
"leased district," the words "permanent settlem
"domestication," "colonizing," "to permanently lo
"settling," "permanent home," etc., are repeatedly
in this connection (Ind. Commr's Rept., 1855, pp.
473; 1856, pp. 566, 726; 1857, p. 296; 1858, pp.
526), while the act of March 3, 1857 (11 Stats.,
183), appropriating money for this purpose, use
word "establishing." The superintendent in char
removing these Indians to their new location wa
structed to give them "to understand that it is to be
permanent home" (Sen. Ex. Doc. No. 13, Forty-ei
Congress, first session, p. 15), and there can be no d
that he did so, and that these Indians accepted the
as their permanent home. Hence when the agree
of 1872 purported to give this particular reservati
these Indians "for a home," all that it effected w
establish definite bounds to what had already been
the permanent home of these Indians by their estab
ment there in 1859. These bounds were enlarged be
those which had been at one time fixed, but practi
they appear to have been the bounds which were
ceded to these Indians ever since the establishmen
the reservations to the south and west. Even if

agreement of 1872 were a nullity, therefore, it is clear that these Indians held this reservation as "their permanent home," or place of "permanent settlement," granted to them by the United States. In other words, under the trust for which the land had been ceded, they had the same right of permanent occupancy as other Indian tribes have had from the earliest settlement of white men in this country, and as the Choctaws and Chickasaws had in the land granted to them, and the same incidental right of ultimate ownership in severalty, and of participation in the proceeds of surplus lands, as had been conceded in every previous case of terminating the tribal system of ownership.

As far as concerns the allotments, the decree is right.

In view of these considerations, the court below was requested to enter its decree in favor of the Wichita and affiliated bands for 160 acres of land apiece and for the proceeds of the sales of the surplus lands authorized by the jurisdictional act; and this, whether it should be held that the cession of the leased district was in trust or absolute. The decree, however, complied only with the first part of this request.

As to so much of the decree as provides that each member of the Wichita and affiliated bands shall receive 160 acres of the land in question, it is submitted that such a disposition of the land undoubtedly comes within the meaning of the words "permanent settlement of friendly Indians." This would be so even if the law of Indian tenure and the long-established practice in regard to Indian lands were left out of consideration. In fact,

if the giving of 160 acres to each Indian in fee simple, without the power of alienation or incumbrance for twenty-five years, be not the "permanent settlement" of such Indians on the land, it is hard to imagine what a permanent settlement can be. The word "permanent," when used of human affairs, can not be equivalent to eternal or perpetual. The most that it can mean is "capable of indefinite continuance." To settle Indians permanently in any district is to take such measures as will insure their remaining there for a reasonable length of time, and the possibility that they and their descendants will remain there indefinitely. To give a person 160 acres of land, holding it in trust for him for twenty-five years, so as to prevent his selling or encumbering it, but allowing him the otherwise unrestricted use of it during that period, and giving him a fee simple title at its expiration, is certainly going as far towards permanently settling that person on that land as can well be imagined.

It has repeatedly been held that where land or other property has been given to secure the permanent establishment of an institution in a particular place, this does not involve the grantee in a covenant to keep the institution there forever, or require him to surrender the property in case the institution is removed. (*Mead* v. *Ballard*, 7 Wall., 290; *Newton* v. *Commissioners*, 100 U. S., 548; *Sumner* v. *Darnell*, 128 Ind., 38; *Hardy* v. *Wiley*, 87 Va., 125.) Thus, in *Texas, etc., Railway Co.* v. *Marshall* (136 U. S., 393), the contract was that in consideration of $300,000 and 66 acres of land the

company "will permanently establish its eastern terminus and Texas office at Marshall, and will also establish and construct at said city the main machine shops and car works of said railway company." In construing this contract, Miller, J., said:

> It seems to us that the real essence of the contract was that the railroad company should, in its process of construction, make this city its eastern terminus, and should establish there its depot, its machine shops, and its car works, and that this should be done in the ordinary course of its business, with the purpose that it should be permanent. But it did not amount to a covenant that the company would never cease to make its eastern terminus at Marshall; that it would for all time continue to have its machine shops and car works there, and that whatever might be the changes of time and circumstances, of railroad rivalry and assistance, these things alone should remain forever unchangeable.
>
> * * * * *
>
> It appears to us, so far from this, that the contract on the part of the railroad company is satisfied and performed when it establishes and keeps a depot, and sets in operation car works and machine shops, and keeps them going for eight years, and until the interests of the railroad company and the public demand the removal of some or all of these subjects of the contract to some other place. This was the establishment at that point of the things contracted for in the agreement. It was the fair meaning of the words "permanent establishment," as there was no intention at the time of removing or abandoning them. The word "permanent" does not mean forever, or lasting forever, or existing

forever. The language used is to be considered according to its nature and its relation to the subject-matter of the contract, and we think that these things were permanently established by the railway company at Marshall.

In the present case the United States has kept the Wichita and affiliated bands on their reservation for over forty years, except during the period when the Choctaws and Chickasaws and their Confederate allies compelled them to take refuge in Kansas in order to preserve their loyalty, and the United States now proposes to prevent the former Indians from parting with their allotments for twenty-five years after they have been selected and taken, after which time they are to have an unrestricted title in fee simple. This makes the settlement one of sixty-five years duration in any event, and as much longer as these Indians and their descendants may see fit. Such a settlement may surely be regarded as permanent, and the court below was certainly right in so holding.

The proceeds of sales of unallotted lands should have been awarded to the cestuis que trustent.

In entering its decree in favor of the Wichita and affiliated bands, awarding them 160 acres apiece, the court below has to a certain extent recognized that the trust was for the permanent benefit of these Indians, and that an allotment of land among them was clearly within the terms of the trust. Had the agreement of 1891 proposed to make larger allotments, even to allot the entire reservation among the Indians, leaving no surplus land whatever, such a disposition of the land would presuma-

bly have been upheld by the court below; for if it be once conceded that these Indians are entitled to enjoy this land permanently, it must also be conceded that they are entitled to have it given to them permanently, i. e., in fee simple, in severalty, whenever they become sufficiently civilized to be fit for ownership in severalty. There is certainly nothing peculiar about the particular size of the allotments, 160 acres, to make this plan of allotment a fulfillment of the trust, while a plan for allotments of 320 acres, or even more, would have been a breach of the trust. This matter has a practical bearing, as the surplus land has not yet been sold, and many of the Indians have come to the conclusion that larger individual allotments would better fulfill the requirements of their case. It is entirely possible that the Government may ultimately decide to increase their size. Although the court below holds, very properly, that the nature of the trust admits of the distribution of the trust land, or some of it, among the *cestuis que trustent* in severalty, it holds that to sell any of the land to outsiders for the benefit of the *cestuis que trustent* would be a breach of trust. This view of the court below is due to its failure to recognize the true nature of the trust, which was, as already shown, to give to such tribes as the United States should place upon the land a permanent settlement, or right of occupancy, thereon, i. e., a full Indian title to the land, such as the United States was in the habit of granting to Indians, with all the incidents of such title, including the same right to receive the benefit of the sale of their surplus land, over and above the quantity required for the allotments, that is conceded to other Indians when their

reservation system comes to an end. If the trust be looked at, as it certainly should be, if there was a trust at all, as intended for the conveyance of an Indian title to the beneficiaries, the cession of 1866 warrants not merely allotment of land among them in severalty, but also the sale of the surplus land for their benefit.

Even if the rights and incidents of an Indian title by occupancy could be disregarded, the fact that the trust was for the permanent settlement of friendly Indians, for their permanent benefit, would warrant their receiving the benefit of the lands sold, in spite of the fact that in consequence of the sale some or even all of these surplus lands may come into the hands of other parties than such as have been settled on them since 1859. Friendly Indians have been settled on this reservation for forty years, occupying it in common, and using it partly for civilized purposes and partly after the manner of Indians. To enable them to use it permanently after the manner of civilized people, it is necessary to divide some of the land up into individual holdings of convenient size, and to sell the surplus so as to obtain funds for the improvement of the allotted land, and the support of the Indians in greater comfort than would otherwise be possible. Such a disposition of the surplus land is obviously not merely for the benefit of the friendly Indians, but also in furtherance of their permanent settlement on the allotted land, for it is evident that an addition to their capital will enable them to do more with the allotted land during the twenty-five years that they will have to keep it than they could otherwise do, and will thus increase its value, while the more valuable the allotted land is to them at

xpiration of the twenty-five years, the more likely will be to continue to remain on it.

cording to any theory of a trust, the land was to be for the benefit of these friendly Indians to enable to be permanently settled. It has been so held for years, during which time these Indians have increased vilization, until now it is to their advantage to sell a on of the land for the improvement of their condi- as owners and occupants of the remainder, over h they are ultimately to have an unrestricted right isposition. Such a disposition of the land, regarded ll friends of the Indian as offering the wisest solution he Indian problem and the most practical means of ring the fair treatment and ultimate civilization of Indians, can not but be held to be a "permanent set- ent" of the Wichita and affiliated bands, and as such ot merely not a breach of the trust, if trust there be, is the best and truest fulfillment of the trust that erican philanthropy and statesmanship have been able devise.

trust did not mean that no part of the land should ever be owned by white men.

The Choctaws and Chickasaws contend, however, that use of this land for the permanent benefit of the chita and affiliated bands, as individuals and ultimate zens, is a breach of trust, the trust being solely for maintenance of these Indians collectively, as mem- rs of the Wichita and affiliated bands, without any hts in severalty, the maintenance of the old tribal nditions being, it is alleged, for the benefit of the

Choctaws and Chickasaws, who created the trust. It is submitted that this contention is utterly unreasonable.

In support of this contention they assert that the land ceded to them in 1820 and 1830 was ceded in order that they should live apart from the white men, that the United States promised to keep white men away from their land, and that it should not be included in any State or Territory of the Union, the obligation of which promises was reaffirmed in Article X of the treaty of 1866. Such reaffirmance, however, was only made in so far as the promises were "not inconsistent with" the new treaty, and even conceding that the cession of the leased district was in trust, the trust was for the permanent settlement of friendly Indians, which permanent settlement might ultimately require the inclusion of that district, or a portion of it within the bounds of a State or Territory, or even the sale of portions of the district to white men. The Choctaws and Chickasaws do more than assert that the cession of 1866 was in trust. They assert that the trust was of a special character, viz, for such a permanent settlement of friendly Indians that no portion of the district ceded should ever be included in any State or Territory, or be open to white settlement.

Inasmuch as the treaty of 1866 says nothing about any trust in this ceded district whatever, but the whole theory of a trust is deduced from the circumstances preceding and attending the cession, the utmost that the Choctaws and Chickasaws can with any color of fairness contend is that the cession was for the benefit of the Indians who were, or were to be, settled on the land, and that it was for these Indians alone to say whether the land should be

included in a State or Territory or be opened to white settlement. To go beyond this and assert that one object of the alleged trust was to prevent the Choctaws and Chickasaws from ever having any white men, or any Indians holding land in severalty, as neighbors to the west of them, and that in this particular the benefit of the Indians actually settled on the land was to be subordinated to the supposed benefit of the Choctaws and Chickasaws, who did *not* live on the land, is to make a bald assertion without a shadow of evidence to sustain it. No such condition was ever imposed upon the trust, if trust there was, when it was created, and it can not be attached to it now.

The presence of white men on the land in question would not injure the Choctaws and Chickasaws.

Even if it had been understood and intended, when the alleged trust was created, that no portion of the leased district should ever be occupied by white men or be under a State or Territorial government, the nonfulfillment of this intention at the present day would entitle the claimants to no compensation, because it would inflict no injury upon them. The Choctaws and Chickasaws are no longer the primitive beings they were in 1820 or 1830. Their advanced condition in 1866 has already been alluded to in connection with the treaty of that year; and on April 23, 1897, they entered into an agreement providing for a distribution of their lands in severalty, with temporary restrictions of alienation (as to a portion of the land the limitation is for one year only), and for the termination of

their tribal governments, the division of all tribal prop-
erty among them as individuals, and the acquisition of
citizenship at the expiration of eight years. This agree-
ment has been ratified by Congress and the Choctaw and
Chickasaw nations, and has now the force of law. (Act
of June 28, 1898, § 29; 30 Stats., 505–513; Ind.
Commr.'s Rept., 1898, p. 77.) The contention that
these people, who are about to abandon their tribal gov-
ernments, and whose very country is itself about to be
thrown open to white settlement, will be entitled to com-
pensation if some of the lands to the west of their own
are sold to white men for the benefit of Indians, rather
than remain occupied by Indians as a tribal community, is
the height of unreason.

The Choctaws and Chickasaws are about to destroy
voluntarily their separate national existence and to be-
come fused in the general mass of the citizens of the
United States—to receive white men into their midst
and to become white men themselves in all but shade of
skin and cast of feature, peculiarities which, in future
generations, will tend even to disappear altogether.
They are going to do this, moreover, because they be-
lieve it to be for their advantage. How, then, can it
injure them if their future fellow-citizens, without dis-
tinction of race or color, occupy the surplus lands to the
west of them?

In point of fact, the present contention of the Choc-
taws and Chickasaws goes beyond what they claimed
from the Southern Confederacy, and before the United
States had paid $300,000 for the cession of the lease

district. The lease, for which the United States had paid $800,000, was renewed to the Confederacy, without further consideration, for ninety-nine years, but it was provided that when the Choctaws and Chickasaws became a State of the Confederacy, provision for which event was made in the treaty, the Indians settled in the leased district should own their lands in fee, and further that—

> * * * When the said bands consent to a partition among themselves, each individual shall have and receive in fee, within the said leased country, as large a quantity of good land as shall or would be apportioned to each Choctaw or Chickasaw in partition of all the national lands, with the right, however, now and in all future time, to the said several bands so settled or to be settled in said leased district to hunt upon all the vacant and unoccupied parts of the same without let or molestation. (Conf. Stat., 314.)

In other words, the claimants agreed in 1861 to the ultimate division of a certain portion of the lands in the leased district in severalty among such Indians as should be settled there, and to the preservation of the balance as hunting grounds for those Indians and not for the claimants themselves. If the lease meant that the Confederacy should divide up the leased district lands in severalty among the occupants as individuals, why should not the cession of 1866 mean that the United States had the same right? And as to the unallotted balance of the lands, why should their being kept as hunting grounds for other Indians be more favorable to the claimants than the sale of the lands would be? In view of the

fact that the United States was required to pay $300,000 for a "cession" of the leased district, but no such consideration was required of the Confederacy, the arrangements entered into with the latter are in strong contrast with what the claimants now demand of the United States.

It may be observed in this connection that the provisions of the treaty with the Confederacy constitute valuable evidence of what the Choctaws and Chickasaws understood, in 1861, by a lease for the permanent settlement of other Indians. When they agreed that so much of the land as was required for allotments should ultimately be given to such Indians in fee in severalty and that the latter, and not the Choctaws and Chickasaws, should have a right to the balance as hunting grounds, they must have done so because they understood such a final disposition of the land to be the consequence of such a lease. Had the lease to the United States continued, they would presumably have agreed, without difficulty, to such a disposition of the land, understanding it to be within the terms of the lease; and this being so, why should the substitution of a cession, a "direct purchase," for the lease, for a new consideration of $300,000, entitle the Choctaws and Chickasaws to object to any disposition of the land whatever for the benefit of the Indians settled thereon, except a mere tribal occupancy after the manner of uncivilized Indians. Even if the Choctaws and Chickasaws had not agreed that their own surplus lands should be sold to white men, the hollowness of their pretense that a similar sale of lands in the Wichita

Reservation would be an injury to them would be readily seen from the fact that for some years past they have allowed white men to settle among them, building towns and railroads, and conducting large mining and business enterprises. The census of 1890 (Indians, p. 256) gives a report of population, which may be tabulated as follows:[1]

CHOCTAW NATION.

Choctaws		10,017
Other Indians, viz:		
Chickasaws	120	
Indians of other tribes	136	
Indian negroes and mulattoes	229	
White Choctaws	122	
Negro Choctaws	207	
Mixed bloods and squaw men	226	
		1,040
Persons of negro descent		4,406
White persons		28,345
Total population		43,808

CHICKASAW NATION.

Chickasaws, viz:		
Pure-blood Chickasaws	3,129	
White Chickasaws	681	
Negro and mulatto Chickasaws	131	
		3,941

[1] For some reason, which does not now appear, the population of the districts of the two nations has not been computed in precisely the same way. White and negro Choctaws are classified "other Indians," although white and negro Chickasaws are classified as Chickasaws. The expression "Indian negroes" in the Choctaw list, is indefinite, but appears to designate negroes who are members of other tribes.

Other Indians, viz:	
Choctaws	76
Indians of other tribes	19
White persons of other tribes	28
Negroes of other tribes	4
Persons of negro descent	
White persons	
Chinese	
Total population	

The Choctaw, Oklahoma, and Gulf Railroad r
100 miles through the Choctaw Nation, and the St
and San Francisco Railroad 135 miles. The M
Kansas, and Texas Railway operates 130 miles
in the Choctaw and Chickasaw nations, mainly
former, and the Atchison, Topeka, and Santa F
way 95 miles through the Chickasaw Nation.
evident that the 460 miles of road, built by per
of the Choctaws and Chickasaws, were not built s
afford traveling facilities to the 13,146 pure-blood
taws and Chickasaws, nor even to the entire
adopted Indian, half-blood, negro, and mulatto
tion, amounting to 24,371. It is perfectly evide
these railroads were built in consequence of the re
of a large number of white people in the count
with the expectation of bringing in others. Th
ence of 86,766 white persons in the country i
and probably many more at the present time, fu
the explanation of the 460 miles of railroad wh
Indians have permitted to be built.

Besides the existence of these railroads with
Choctaw and Chickasaw nations, which existe

fact of geography, it is also well known that important coal mines exist in the Choctaw country. Even in 1889 752,832 tons of coal, worth $1,323,807, were mined there, necessitating the employment of 1,862 persons. (Census of 1890, Indians, p. 262.) Since then the mining has greatly increased, and mines are now worked at Krebs, Lehigh, Coalgate, Alderson, Hartshorne, and elsewhere. (Rec., 335, 336.) It is also significant that the census of 1890 (Indians, p. 260) reports 76 post-offices in the Chickasaw Nation, and 73 in the Choctaw Nation.

The presence of railroads, mines, and post-offices indicates not merely the civilization of the Choctaws and Chickasaws themselves, and their adoption of the "white man's way," but also that the large number of white people who reside in that country do so by the consent of the Indians. At the trial in the court below, it was contended that the white population in the Choctaw and Chickasaw nations was there because of the failure of the United States to remove intruders. No evidence in support of this contention was introduced, but counsel for the United States called on the Secretary of the Interior for information on this point. In reply he transmitted a report from the Commissioner of Indian Affairs. (Rec., 330–337.) This report shows that the alleged intruders are mostly persons to whom the Indians have rented farming land on shares (Rec., 330), or who in other ways acquired rights of residence by permit or contract. (Rec., 332.) From time to time the Government has been asked to remove intruders, and many persons have been removed in consequence, but it has always happened that the majority of the persons complained of either could

not be identified by the Choctaw and Chickasaw authorities (Rec., 335), or else obtained permission to remain. (Rec., 332, 336.) It would seem that in many, if not most, cases the alleged intrusion merely meant neglect to pay the permit tax, and that when the complaint had the desired effect, and the tax was paid, the parties were allowed to remain. Certainly there is nothing in this report to indicate any substantial failure on the part of the United States to perform its duty of removing intruders, especially in view of the established practice of the Choctaws and Chickasaws to grant permits of residence to all white men who would pay the permit tax. The contention that the Choctaws and Chickasaws would be injured by the sale of portions of the Wichita Reservation to white men must fall to the ground.

CONCLUSION.

It is, therefore, submitted, in the first place, that the Wichita Reservation is the absolute property of the United States as against the Choctaws and Chickasaws, and in the second place, that if the title of the United States is not absolute, then it must be in trust for the sole purpose of granting an exclusive Indian title to the Wichita and affiliated bands, which title the United States has undertaken to grant, by placing these latter Indians on the reservation and supporting them there, so that an allotment of a portion of the reservation to these latter Indians individually, and the sale of the balance for their benefit, are in fulfillment of the trust. The court is therefore asked to reverse and set aside the

decree of the court below, and to remand the case to the said court with directions to enter a decree dismissing the petition of the Choctaw Nation and the Chickasaw Nation, and ordering the allotment of 160 acres of land in the Wichita Reservation to each member of the Wichita and affiliated bands, in accordance with, and under the restrictions of, the agreement of June 4, 1891, and also ordering the proceeds of all sales of the unallotted portion of the said reservation to be disposed of for the benefit of the said Wichita and affiliated bands in accordance with the provisions of section 6 of the act of February 8, 1887 (24 Stats., 388), commonly called the "Dawes land in severalty act," and further ordering the said Wichita and affiliated bands to execute a release to the United States of all right, title, interest, and claim, of any nature whatsoever, in and to any lands within the limits of the United States except those allotted to them.

The reasons for requiring a release from the Wichita and affiliated bands will appear in a brief, hereafter to be filed, upon the issues raised by the appeal of the said bands of Indians.

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JOHN W. GRIGGS,
Attorney-General.

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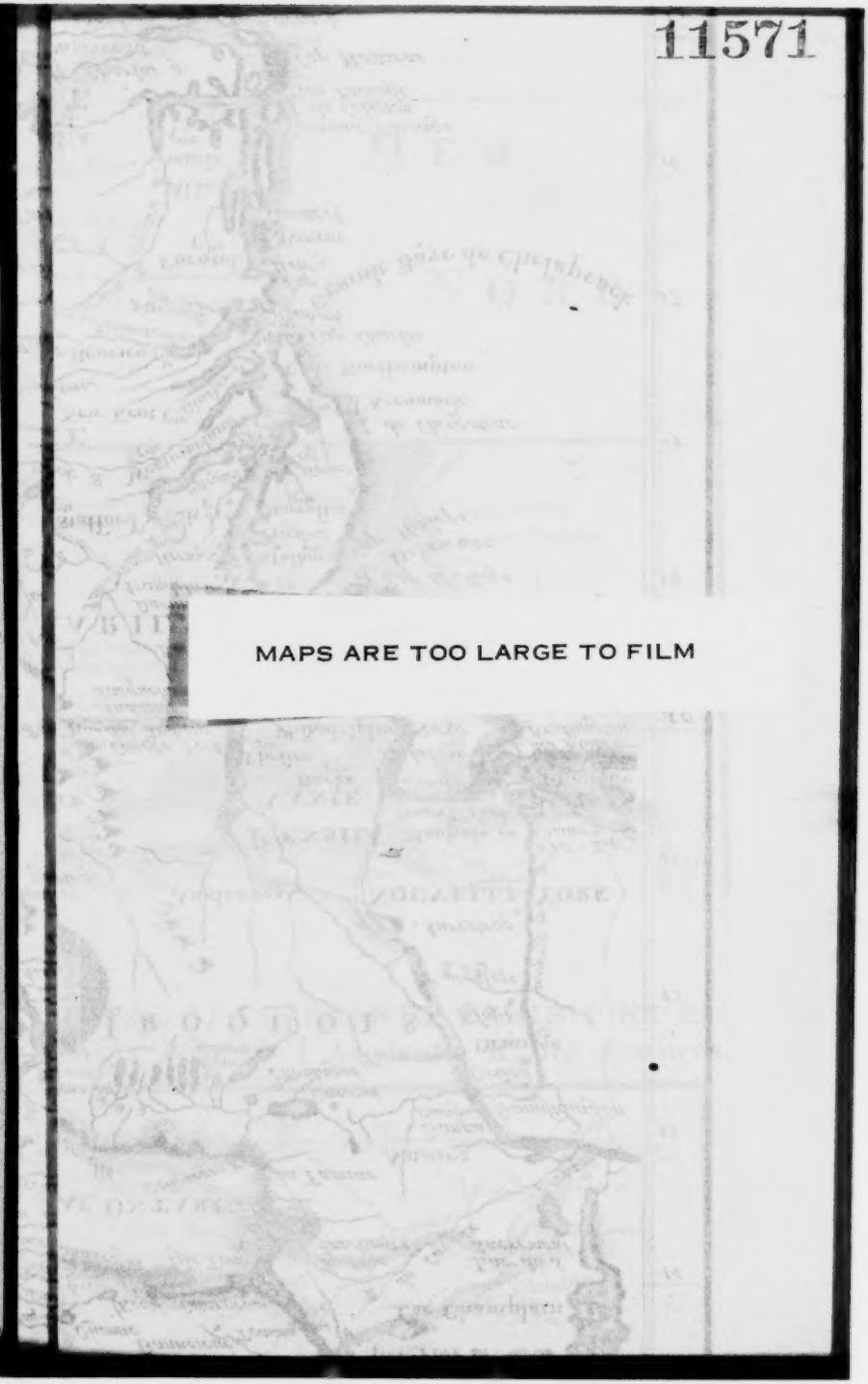

MAPS ARE TOO LARGE TO FILM